Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

FRANK BARRETT,

Petitioner,

vs.

NANCY I. HARRINGTON,
a/k/a Penny Harrington,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an elected state court judge exercise a judicial function to which absolute immunity from suit for damages pursuant to 42 United States Code § 1983 attaches where such judge makes a report to law enforcement officials requesting investigation of a citizen, who was previously a litigant before such judge in a matter as to which the judge's jurisdiction had long since ended, and thereby accuses such citizen of criminal conduct where such accusation is known by the judge to be false, in retaliation for such citizen's advocacy of the judge's electoral defeat or in order to prevent or intimidate such citizen from publicly disseminating information about the judge's own criminal misconduct.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES CITED:

Barrett v. Harrington, 130 F.2d 246 (6th Cir. 1997)....*passim*

Briscoe v. Lahue, 460 U.S. 325 (1983)..... 8

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) 9

Forrester v. White, 484 U.S. 219 (1988) 8, 9

Harper v. Merckle, 638 F.2d 848 (5th Cir. 1981)..... 13

Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979).....13, 15

Imbler v. Pachtman, 424 U.S. 409 (1976)..... 9

Johnson v. Jones, 515 U.S. 304 (1995)..... 12

Kalina v. Fletcher, ___ U.S. ___, 118 S. Ct. 502 (1997) 9, 10, 16

King v. Love, 766 F.2d 962 (6th Cir. 1985)..... 13

Lopez v. Vanderwater, 620 F.2d 1229 (7th Cir. 1980) 11

Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993)..13, 14

Malley v. Briggs, 475 U.S. 335 (1986).....9, 12

Martinez v. Winner, 771 F.2d 424 (10th Cir. 1985), *reversed in part*, 778 F.2d 553, *vacated and remanded*, 475 U.S. 1138 (1986), *on remand*, 800 F.2d 230 (10th Cir. 1986).....14, 15

Morrison v. Lipscomb, 877 F.2d 463 (6th Cir. 1989) 15

Pierson v. Ray, 386 U.S. 547 (1967) 8

Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984)..... 14

Sparks v. Character and Fitness Committee of Kentucky, 859 F.2d 428 (6th Cir. 1988)..... 15

TABLE OF AUTHORITIES – Continued

Page

Stump v. Sparkman, 435 U.S. 349 (1978) 8

United States v. Martinez, 667 F.2d 886 (10th Cir. 1981), *cert. denied*, 456 U.S. 1008 (1982) 15

STATUTES CITED:

Tennessee Code Annotated § 27-5-108 (1980) 2, 4

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 7

42 U.S.C. § 1983 ..... 1, 2, 8

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Frank Barrett, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 20, 1997, in order to prevent an extension of absolute judicial immunity from suit for damages under 42 United States Code § 1983 further than the justifications for the doctrine would warrant based upon prior decisions of this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this petition is reported at 130 F.3d 246 (6th Cir. 1997). It is reproduced in the appendix to this petition at App. pp. 1-44. The order and memorandum opinion of the United States District Court, filed July 31, 1996, is unreported. It is reproduced in the appendix to this petition at App. pp. 45-71.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit that gives rise to this petition was rendered on November 20, 1997. No petition for rehearing was filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The statute pursuant to which the instant suit is brought is 42 United States Code § 1983, which at the time of the actions and omissions complained of and at the time this suit was brought provided: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

This petition also refers incidentally (fn. 1, *infra*) to Tennessee Code Annotated § 27-5-108 (1980):

> **27-5-108. Appeal from general sessions court.** – (a) Any party may appeal from an adverse decision of the general sessions court to the circuit court of the county within a period of ten (10) days on complying with the provisions of this chapter.

(b) The provision allowing ten (10) days in which to perfect an appeal shall apply in every county of Tennessee, any provision of any private act to the contrary notwithstanding, it being the legislative intent to establish a uniform period of ten (10) days in which any such appeal may be perfected in any county in Tennessee.

(c) Any appeal shall be heard de novo in the circuit court.

(d) If no appeal is taken within the time provided, then execution may issue. [Acts 1959, ch. 109, § 4; T.C.A., § 27-509; modified.]

STATEMENT OF THE CASE

The Plaintiff Frank Barrett is a roofing contractor and a citizen of the United States and Tennessee. The Defendant Nancy I. (Penny) Harrington is an elected judge of the General Sessions Court in Nashville and Davidson County, Tennessee. (App. 2-3, 72-73.) As this case came before the Court of Appeals on an interlocutory appeal from the trial court's denial of Ms. Harrington's motion for summary judgment based on absolute or qualified immunity, the facts developed before the trial court must be considered at this stage in the light most favorable to Mr. Barrett.

Mr. Barrett was sued by the Metropolitan Government of Nashville and Davidson County for failing to obtain building permits, a civil matter that came to be heard before the Defendant Judge Harrington during September 1994. Mr. Barrett then observed that Judge

Harrington displayed an unusually arrogant and irascible temperament and failed to show appropriate respect for litigants appearing before her, leading him to conclude that Judge Harrington is not a fit person to hold public office. Mr. Barrett decided to advocate the political viewpoint that Ms. Harrington should not be elected to office in the future. (App. 73.)

In order to effectuate his political advocacy, Mr. Barrett gathered information about Judge Harrington from a variety of sources available to the general public, including information indicating that Judge Harrington had dismissed parking citations issued against her and/or her husband. This information led Mr. Barrett to believe that Judge Harrington had engaged in criminal conduct while in office. (App. 73.)

On February 13, 1995 Mr. Barrett obtained certified copies of several of these citations. The next day he was contacted by a detective with the Metropolitan Nashville Police Department Murder Squad, who questioned him about his activities in regard to gathering information about Judge Harrington.[1] The detective advised that she

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[1] The Defendant's conduct which is at issue in this action began in February 1995, long after proceedings involving the Plaintiff as a litigant in Judge Harrington's court had ended. The pleadings before the trial court indicate that this September 1994 general sessions lawsuit was appealed to the Circuit Court of Davidson County. Tennessee Code Annotated § 27-5-108 (1980) requires that an appeal from the judgment of a municipal or general sessions be taken within ten (10) days. Such an appeal is heard *de novo* in the circuit court; a remand for hearing before the Defendant Judge Harrington therefore was never possible.

was investigating an allegation that Mr. Barrett was "stalking" Judge Harrington. Stalking is a criminal offense which in Tennessee is regarded with some considerable seriousness. (App. 74.)

The investigation of Mr. Barrett concluded without his being charged with any crime. Mr. Barrett has in fact never "stalked" Judge Harrington nor engaged in criminal conduct of any kind directed at her. (App. 74.)

During August or September 1995 Mr. Barrett gave truthful information regarding the Defendant's dismissal of her own parking tickets to a reporter for the *Nashville Banner* newspaper, resulting in widespread, unflattering media attention being focused on Judge Harrington. The Defendant thereafter falsely accused Mr. Barrett of stalking her in conversations with representatives of certain news media, which false allegations were published in the *Nashville Banner* and broadcast throughout Middle Tennessee and beyond on a Nashville ABC affiliated television station's 10:00 p.m. news broadcast. (App. 75.)

The complaint in the instant lawsuit was filed September 21, 1995. The Plaintiff alleged that the Defendant Judge Harrington had requested a police investigation of him in unconstitutional retaliation for his information-gathering activities which are protected by the First Amendment to the United States Constitution and had made false and defamatory accusations of criminal conduct to news media representatives in unconstitutional retaliation for his First Amendment protected conduct in

furnishing information about Judge Harrington's criminal conduct with regard to the parking tickets to a news reporter.[2]

Judge Harrington admitted in deposition testimony that she had written to the District Attorney General and to the United States Attorney for the Middle District of Tennessee requesting an investigation of Mr. Barrett. (App. 79.) The letters requesting these investigations (App. 84-87) were dated February 9, 1995. The Defendant testified that "[s]omewhere about the same time" she looked at the stalking law and determined that Mr. Barrett's conduct was not covered by this law, because there had been no specific verbal or written threat or unconsented-to physical contact. She did not know whether he was following her or not. (App. 79-81.)

Judge Harrington was intimately familiar with the stalking statute then in force – she was involved in the drafting of the law and had conducted trials and probable cause determinations in stalking cases. For three years the Defendant and one other judge had heard all of the domestic violence cases in the Davidson County General Sessions Court. (App. 78.) The Defendant testified that she never appeared before any judge or magistrate to ask for issuance of a warrant charging the Plaintiff with any crime "[b]ecause I never found a statute which satisfied

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[2] No issue as to the Defendant's retaliatory communications to the news media falsely accusing Mr. Barrett of stalking is presented in this petition – both the District Court and the Court of Appeals opined that this is non-judicial conduct for which the Defendant is entitled to neither absolute nor qualified immunity.

me that I had probable cause to seek a warrant against him." (App. 83.)

After discovery was completed the Defendant moved to dismiss the Plaintiff's federal claims and simultaneously moved for summary judgment on the federal claims,[3] both motions being based on her claim of absolute judicial immunity or qualified immunity. The trial court denied summary judgment as to the Plaintiff's First Amendment claim of unlawful retaliation and denied the motion to dismiss as moot in an order and memorandum opinion filed July 31, 1996. (App. 45-71.)

The Defendant appealed the denial of her claims of immunity pursuant to the "collateral order" exception to the finality requirement of 28 U.S.C. § 1291. In an opinion filed November 20, 1997, the United States Court of Appeals for the Sixth Circuit reversed in part and affirmed in part the trial court's denial of summary judgment. The Court of Appeals ruled that the Defendant is entitled to absolute immunity for requesting an investigation of the Plaintiff, but she is not entitled to absolute or qualified immunity for her statements to media representatives regarding the Plaintiff. (App. 44; 130 F.2d, at 264.)

REASONS FOR GRANTING THE WRIT

This Court's precedents hold that state court judges are absolutely immune from liability for their judicial

[3] The Defendant did not seek dismissal or summary judgment as to the Plaintiff's pendent claim of defamation under Tennessee law.

acts. *Briscoe v. Lahue*, 460 U.S. 325, 334 (1983). It is only for acts performed in the "judicial" capacity that a judge is absolutely immune, however. *Stump v. Sparkman*, 435 U.S. 349, 360 (1978). The instant case is about the difference between judicial and non-judicial acts. The Plaintiff/Petitioner submits that the decision of the Court of Appeals represents an extension of judicial immunity to insulate from accountability an elected judge's acts of naked retaliation against a political critic in a manner unwarranted by this Court's precedents.

This case presents an important question of law as to the boundaries between judicial acts, as to which state court judges are immune from suit for damages under 42 U.S.C. § 1983, and non-judicial acts, as to which the statute's reference to "[e]very person" means what it says rather than meaning "every person except judges." *See, Pierson v. Ray*, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting). This Court has never undertaken to articulate a precise and general definition of the class of acts for which a judge is entitled to immunity. *Forrester v. White*, 484 U.S. 219 (1988). The Court has, however, endorsed a functional analysis to determine which acts are protected, that is, whether the actions are truly judicial acts or acts that simply happen to have been done by judges. *Id.*, at 227.

The case at bar involves an elected state court judge's misuse of the power and prestige of her office in order to attempt to silence or intimidate a political opponent by representing to state and federal prosecutors that the Petitioner, who was then actively advocating the Respondent's electoral defeat, was stalking her. The Respondent knew this charge to be blatantly false, in that she had

parsed the statute prohibiting stalking and determined that it did not apply to the Petitioner's alleged conduct. The functional analysis mandated in *Forrester, supra,* indicates that the Respondent's conduct was not that of a judge; it instead was that of a complaining witness.

Complaining witnesses were not absolutely immune at common law, and where a complainant acted maliciously and without probable cause, he enjoyed no immunity whatever. *Malley v. Briggs,* 475 U.S. 335, 340-41 (1986). This Court in *Malley* expressly declined to extend absolute immunity to police officers who act as complaining witnesses seeking issuance of arrest warrants. *Id.,* at 343.

In a case decided since the Court of Appeals opinion in the instant matter, this Court has held that a prosecuting attorney is not entitled to absolute immunity for making false statements of fact in an affidavit supporting an application for an arrest warrant. *Kalina v. Fletcher,* ___ U.S. ___, 118 S.Ct. 502, 509-10 (1997). The Court had previously ruled that a prosecutor has no absolute immunity where he is alleged to have fabricated evidence concerning an unsolved crime. *Buckley v. Fitzsimmons,* 509 U.S. 259, 275 (1993).

The absolute immunity a prosecutor enjoys when acting in his role as an advocate on behalf of the state – a function "intimately associated with judicial phase of the criminal process," *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976) – springs from the same well as absolute judicial immunity. *See, Imbler,* at 422-23. The conduct of the instant Respondent – reporting information (known to be

false) to authorities in order to procure a spurious investigation or prosecution of an innocent citizen – would be actionable if engaged in by a prosecuting attorney or police office. Under the reasoning of the Court of Appeals, however, it is not actionable where a judge, whose duties do not normally include the instigation of criminal investigations,[4] engages in such conduct.

The Court of Appeals seems to have credited the Respondent's claim that the Petitioner in fact engaged in investigating conduct which constituted or could have constituted an obstruction of justice:

> "If Judge Harrington believed Mr. Barrett's actions amounted to obstruction she had a duty to report to the proper authorities, and therefore she must be immune from liability for doing so."

(App. 28; 130 F.3d, at 258.) The facts as to Mr. Barrett's conduct, however, were controverted. In determining immunity on a motion to dismiss or for summary judgment, a court must accept the plaintiff's version of facts as true. *See, Kalina v. Fletcher, supra,* ___ U.S. at ___, 118

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[4] The Court of Appeals acknowledged that "the act of writing a letter of complaint to prosecuting authorities is distinguishable from . . . acts [as to which this Court had previously recognized absolute immunity,] as this type of conduct can [be], and usually is, undertaken by a citizen complainant or law enforcement personnel. Furthermore, the instigation of criminal proceedings, by definition, is not adjudicatory in nature and does not resolve a dispute between two parties, but rather initiates one." (App. 25-26; 130 F.2d, at 257.)

S.Ct., at 505; *Lopez v. Vanderwater*, 620 F.2d 1229, 1231 (7th Cir. 1980).

Under the Court of Appeals' apparent view of the case, the Respondent's conduct is judicial in nature because it was undertaken:

> "to protect the integrity of the judicial decision-making process. . . . Judge Harrington understandably felt threatened by Barrett's statements, and the letters she wrote to prosecutors were clearly designed to address and deter such conduct, and directly related to her role in adjudicating the case which engendered Barrett's conduct in the first place."

(App. 30; 130 F.2d, at 259.) The Court of Appeals concluded that:

> "in circumstances in which a judge *reasonably* perceives a threat to himself or herself arising out of the judge's adjudicatory conduct, the judges's response, . . . is a judicial act within the scope of judicial immunity."

(App. 31; 130 F.2d, at 259 [emphasis added].) This analysis and the Court of Appeals' conclusion is obviously premised upon the reasonableness of Judge Harrington's perception of a threat, a question which should not have been resolved on an appeal from a denial of summary judgment. If the Court of Appeals had credited Mr. Barrett's proffered evidence that he engaged in no unlawful conduct toward Judge Harrington, the Respondent's response cannot have been deemed reasonable.

In the context of qualified immunity, where a defendant would be entitled to immunity under his version of

the facts but not under the plaintiff's version, the question of immunity must be resolved by a trial on the merits, such that a denial of summary judgment is not reviewable on interlocutory appeal where such disputed facts exist. *See, Johnson v. Jones*, 515 U.S. 304 (1995). If, as in the instant case, a lower court accredits one among competing versions of disputed facts in absolute immunity cases, a plaintiff should arguably be entitled to trial if he is able to show the existence of a factual dispute as to the conduct of the defendant on which the question of immunity turns.

One reason that absolute immunity has been sparingly recognized is to avoid inquiry into fact-specific questions. The determination of whether reasonable grounds exist to bring criminal charges against a citizen, however, is always fact-specific. *See, Malley v. Briggs, supra.*

The reported federal appellate cases in which judges have been sued for instigating criminal charges have been fortunately few. The instant decision of the Court of Appeals, however, finds little support in the few arguably analogous cases of which the undersigned counsel is aware.[5] The judge's motivation appears to be a relevant criterion:

> "[W]hen it is beyond reasonable dispute that a judge has acted out of personal motivation and

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[5] The Court of Appeals in the instant case acknowledged its awareness of some cases cited hereinbelow, including two prior Sixth Circuit cases, but did not attempt to specifically distinguish the instant case. (App. 22-24, n.11; 130 F.3d, at 256 n.11.)

> has used his judicial office as an offensive weapon to vindicate personal objectives, and it further appears certain that no party has invoked the judicial machinery for any purpose at all, then the judge's actions do not amount to 'judicial acts.' "

Harper v. Merckle, 638 F.2d 848, 859 (5th Cir. 1981).

In *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979), a defendant judge who, among other things, maliciously accused the plaintiff of unlawful conduct, publicly wrote that the plaintiff was engaging in criminal conduct, wrote to the City Attorney to urge disciplinary action against the plaintiff, met with officials of the State Attorney General's office and threatened to accuse the plaintiff of misconduct, read the contents of warrants for the plaintiff's arrest over a radio station broadcast and disseminated a press release with regard to the plaintiff's activities, was held to have engaged in non-judicial acts for which he was not immune from suit. *Id.*, at 336. In *King v. Love*, 766 F.2d 962 (6th Cir. 1985), a judge was deemed to have engaged in non-judicial conduct where he asked a police officer to arrest the plaintiff pursuant to an outstanding arrest warrant which named a person other than the plaintiff, falsely stating that the plaintiff and the person named in the arrest warrant "were one and the same." *Id.*, at 964, 968.

In *Malina v. Gonzales*, 994 F.2d 1121 (5th Cir. 1993), a Louisiana judge stopped a motorist on the highway and thereafter caused a police officer to appear at the motorist's home and unofficially summon him to court the next day. When the motorist appeared, the judge charged him with various traffic offenses and directed him to appear

before another judge at a later time. The Court of Appeals upheld the trial court's denial of judicial immunity for these actions, opining that they are not closely related to a judicial function. *Id.*, at 1124.

In *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984), a juvenile court judge had contracted with the county government to collect overdue child support payments. The plaintiffs there alleged that, in order to discharge this responsibility, the judge instructed staff members to initiate criminal prosecutions against fathers who were in arrears on their payments, whereupon such charges were used as leverage to extract signatures on consent orders that were approved, without hearings, by the same judge. The judge, with the aid of a juvenile court referee, initiated civil contempt proceedings against those fathers who did not remain current on their payments under the consent orders, resulting in the fathers being either incarcerated or required to make purge payments. The Court of Appeals, Sixth Circuit, opined that initiating accusatory processes such as criminal prosecutions or civil contempt proceedings is not a function normally performed by a judicial officer. *Id.*, at 272.

The sole case discussed at length in the instant Court of Appeals opinion, *Martinez v. Winner*, 771 F.2d 424 (10th Cir. 1985), *reversed in part*, 778 F.2d 553, *vacated and remanded*, 475 U.S. 1138 (1986), *on remand*, 800 F.2d 230 (10th Cir. 1986), is easily distinguishable. There the defendant judge's acts occurred during the course of a criminal trial over which Judge Winner was then presiding. The civil plaintiff/criminal defendant was able to seek appellate review, and indeed successfully obtained relief on

appeal for the trial judge's highly irregular acts.[6] *United States v. Martinez*, 667 F.2d 886 (10th Cir. 1981), *cert. denied*, 456 U.S. 1008 (1982). Moreover, the judge's irregular actions occurred in response to his suspicion that the defendant in the criminal case or someone, *during the course of the trial*, was intimidating jurors. The District Judge in that case noted that "[c]ases such as *Harris v. Harvey[, supra,]* which dealt with a public and private campaign by a judge to vilify a city official, involve liability for conduct outside the judicial function, and are therefore inapposite." *Martinez v. Winner*, 548 F.Supp. 278, 307 N.48 (D. Colo. 1982).

The authorities discussed above indicate that the instant Respondent's conduct in falsely accusing the Petitioner of stalking or following her, obstructing justice and trespassing at her home are not judicial acts; they are instead the acts of a panicky, desperate politician seeking to intimidate a critic who had the goods on her. The Petitioner fervently hopes that this Court will not accept the proposition that a judge's lying to law enforcement authorities to save his or her political career is a function normally performed by a judge.

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[6] One criterion of whether an act is a judicial act is the availability of review by an appellate court. *See, Sparks v. Character and Fitness Committee of Kentucky*, 859 F.2d 428, 433 (6th Cir. 1988). "[A] litigant offended by a judicial act can, in the vast majority of cases, appeal the court's decision to a higher court; [where] no direct appeal is available, . . . [the] absence of judicial liability [is] far less reasonable." *Morrison v. Lipscomb*, 877 F.2d 463, 466 (6th Cir. 1989).

CONCLUSION

The opinion of the Court of Appeals in this matter represents an extension of the doctrine of absolute judicial immunity which is completely unwarranted by the decisions of this court and other decisions of several United States Courts of Appeal. The Petitioner requests this Court to issue the writ of certiorari and grant plenary review of the Court of Appeals decision or, in the alternative, to issue the writ of certiorari, vacate the opinion of the Court of Appeals and remand to the Court of Appeals for further consideration in light of *Kalina v. Fletcher*, ___ U.S. ___, 118 S.Ct. 502 (1997).

Respectfully submitted,

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Frank BARRETT, Plaintiff-Appellee,

v.

Nancy I. HARRINGTON, a/k/a Penny Harrington, Defendant-Appellant.

No. 96-6207.

United States Court of Appeals,
Sixth Circuit.

Argued Aug. 5, 1997.

Decided Nov. 20, 1997.

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Before: KEITH and SUHRHEINRICH, Circuit Judges; ROSEN, District Judge.*

OPINION

ROSEN, District Judge.

I. INTRODUCTION

In a complaint filed September 21, 1995, Plaintiff/Appellee Frank Barrett alleges, pursuant to the provisions

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* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

of 42 U.S.C. § 1983, that he is entitled to recover damages from the Defendant/Appellant, Judge Nancy ("Penny") Harrington. Mr. Barrett claims that Judge Harrington violated his First and Fourteenth Amendment rights by falsely accusing him of stalking her in retaliation for his efforts in revealing her allegedly illegal conduct as an elected official. Mr. Barrett also asserts a pendent state law claim of defamation under Tennessee common law.

On February 14, 1996, Judge Harrington filed a motion to dismiss, as well as a motion for summary judgment claiming in both that she was entitled to either absolute or qualified immunity. Also on February 14, 1996, Barrett moved for partial summary judgment on the merits of his claims.

On July 30, 1996, the District Court determined Defendant's motion to dismiss was moot, having effectively consolidated it with the motion for summary judgment. The court then granted Judge Harrington's motion for summary judgment in part, finding she was entitled to qualified immunity on Barrett's claim of due process violations, but denied her motion with respect to Plaintiff's First Amendment claim. The court also denied Barrett's motion for summary judgment, finding that genuine issues of material fact precluded the entry of judgment on the merits of Plaintiff's complaint. We now AFFIRM in part and REVERSE in part.

II. FACTUAL BACKGROUND

This action arises from a well-publicized conflict between the parties. Plaintiff/Appellee Frank Barrett is the owner of a roofing business which, at the time, was

involved in an ongoing controversy with the Department of Codes Administration of the Metropolitan Government of Nashville and Davidson County regarding work permits for various projects. Defendant/Appellant Nancy ("Penny") Harrington is an elected Metropolitan General Sessions Judge of Nashville and Davidson County, primarily responsible for the environmental docket.

In September 1994, Barrett appeared before Judge Harrington in Environmental Court regarding two violations of the Environmental Codes. At the conclusion of a bench trial, Judge Harrington rendered judgments in favor of the Codes Department and against Barrett. Mr. Barrett alleges that at the hearing Defendant was "unusually arrogant and irascible . . . and failed to show appropriate respect for litigants appearing before her." (Joint Appendix, p. 30). Based on these observations, Plaintiff determined that Defendant was not "fit . . . to hold public office" and decided to investigate her in order to advocate opposition to her re-election. (J.A., p. 30).

During the course of his investigation, Barrett visited various state and local government offices to gather information regarding Judge Harrington. In the course of this investigation, Mr. Barrett discovered that Judge Harrington had dismissed parking tickets that had been issued to her and her husband.

On February 1, 1995, Mr. Barrett visited the Davidson County Election Commission Offices to request documents about Judge Harrington. While requesting these documents from Joan Nixon, an executive secretary to the

Election Commission, Barrett expressed his strong feelings about Judge Harrington and made profane statements. Barrett's remarks and his conduct apparently made Ms. Nixon concerned for Judge Harrington's safety. Although Ms. Nixon did not have a personal relationship with Judge Harrington, Ms. Nixon called Judge Harrington and notified her of Barrett's behavior.

At approximately this same time, Larry Brinton, a television news reporter, called Judge Harrington and told her that Mr. Barrett was investigating her and urging him to do a news story about her concerning the dismissal of the parking tickets. Mr. Brinton also told Judge Harrington that Barrett was very hostile towards her and suggested that she should be concerned for her safety because of Barrett's behavior and demeanor. (The record does not reflect how Judge Harrington responded to Mr. Brinton).

Defendant asserts she became fearful of Barrett after she was informed that he exhibited violent and threatening behavior during his investigation in various public offices. (J.A., pp. 257-58). On February 9, 1995, using her judicial letterhead, Judge Harrington wrote separate letters to State District Attorney General Victor S. Johnson, III and United States Attorney John Roberts, requesting that they investigate Barrett because he was "attempting to obstruct justice by harassing [her] and [her] family," including requiring her to recuse herself from future cases against him, which were likely to arise due to his ongoing dispute with the Codes Department. (J.A., pp. 135-36). Harrington explained in her deposition that she used her judicial letterhead because she "was a judge asking for protection from a disgruntled litigant." (J.A., p.

273). During this same time, Harrington retained Todd Campbell to represent her "in relation to further investigation of possible criminal activity by Mr. Barrett and, possibly, civil suits against him." (J.A., p. 328; J.A., p. 276).

Despite pursuing criminal sanctions against Mr. Barrett, Judge Harrington later admitted in deposition that "[s]omewhere about the same time" that she wrote to state and federal prosecuting attorneys requesting an investigation of the Plaintiff, she reviewed the applicable state stalking statute to determine whether the Plaintiff's conduct fit the prohibitions of the statute and determined that it did not. (J.A., pp. 268-70).[1]

Apparently in response to Harrington's letter to District Attorney General Johnson, Detective Anna-Maria Williams of the Metropolitan Police Department called Harrington on February 13, 1995 and questioned her about Barrett's actions. Later that same day, Detective Williams filed a police report which listed Harrington as a victim of stalking and Barrett as the suspect. (J.A., pp. 340-41). Also on this day, Barrett made certified copies of the parking tickets issued to Harrington and her husband that she had dismissed. The next day, Detective Williams questioned Barrett about his recent conduct and advised

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[1] Harrington herself was apparently "instrumental in the creation" of this stalking law. (J.A., p. 268).

him that he was being investigated for stalking Judge Harrington. (J.A., p. 174).[2]

On February 28, 1995, Harrington, again using her judicial stationary, wrote to Richard H. Dinkins, Chairman of the Davidson County Election Commission, regarding Barrett's attempts to have Nixon fired upon his learning that Nixon had called Harrington about his conduct at the Elections Commission office. (J.A., pp. 259-60, 328). In that letter, Harrington told Dinkins that "Mr. Barrett appears to be 'investigating' or 'stalking' me, depending on one's point of view, as a result of my

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[2] The applicable stalking statute in effect at the time provided that:

(a)(1) A person commits the offense of stalking:

(A) Who repeatedly follows or harasses another person with the intent to place that person in reasonable fear of a sexual offense, bodily injury or death;

(B) Whose actions would cause a reasonable person to suffer substantial emotional distress; and (C) Whose acts induce emotional distress to that person.

(2) As used in this subsection:

(A) "Follows" means maintaining a visual or physical proximity over a period of time to a specific person in such a manner as would cause a reasonable person to have a fear of a sexual offense, bodily injury or death;

(B) "Harasses" means a course of conduct directed at a specific person which would cause a reasonable person to fear a sexual offense, bodily injury, or death, including, but not limited to, verbal threats, written threats, vandalism, or unconsented-to physical contact; and

(C) "Repeatedly" means on two (2) or more separate occasions.

Tenn.Code Ann. § 39-17-315 (1996).

finding him in violation of the Metro ordinance for refusing to obtain a permit for roofing for hire and refusing to obey a 'stop work order.' " (J.A., p. 328). Harrington also advised Dinkins that she had contacted District Attorney General Johnson and U.S. Attorney Roberts, and that she had retained Mr. Campbell. (J.A., p. 328).

Thereafter, at a March 1995 General Sessions Judges' meeting, in front of all the other judges, Harrington told Judge William E. Higgins that he should tell his "friend Frank Barrett" to "watch [his] step," because she had retained Todd Campbell to represent her against Barrett, emphasizing that Barrett was "stalking" her and that Mr. Campbell was a prominent lawyer whose clients included Vice-President Al Gore. (J.A., pp. 352, 296-98). Harrington further stated that she had pursued this matter with her "friends" at "8th and Broad," apparently a reference to the federal courthouse. (J.A., pp. 350-52). A few weeks later, Harrington and Higgins encountered each other on the third floor of the Metropolitan Courthouse. Harrington, in front of others, loudly told Higgins that Plaintiff was stalking her and shouted, "Your friend Frank Barrett is a fruitcake." (J.A., p. 353). Higgins described Harrington's demeanor in making each of these statements as "very angry and red-faced and angry at me, sort of venomous." (J.A., p. 354).

In August/September 1995, Barrett gave the information about the parking tickets Harrington had dismissed on behalf of herself and her husband to a reporter at the Nashville Banner. This revelation resulted in unfavorable media attention for Harrington. (J.A., pp. 174, 181). On September 7, 1995, Harrington met with Toni Dew, a reporter for the Nashville Banner newspaper, who had

requested an appointment to interview her. During this interview, which took place in the Judge's office behind the jail docket bench, Harrington discussed the parking tickets and stated that Barrett had been stalking, harassing, and otherwise intimidating her. (J.A., pp. 303-11). Harrington's statements appeared in Toni Dew's September 19, 1995 column in the Nashville Banner. (J.A., pp. 310, 345).[3]

On September 12, 1995, Mr. Jay Korff, a reporter for WKRN Channel 2 News, showed up on Harrington's doorstep and interviewed Harrington at her home. (J.A., p. 312). This interview, which appeared on the evening news that same day, quotes Harrington as stating that Barrett was stalking her and that she felt threatened and intimidated by him. (J.A., pp. 180-81).[4]

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[3] The September 9, 1995, column includes the following:

Metro General Sessions Judge Penny Harrington continues to publicly accuse Williamson County businessman Frank Barrett of stalking her. * * *

During an interview with the Nashville Banner, Harrington said Barrett has been on a "rampage" against her since she fined him $50 in Environmental Court more than a year ago.

"And ever since then, this man has been absolutely stalking me," Harrington said.

[4] Some of the statements from the September 12, 1995 broadcast include the following:

Anne Holt: Good evening, Judge Penny Harrington says she's been stalked and now claims the man is out to ruin her.

John Seignenthaler: It is a strange story from a woman known as a tough judge. We begin "10 at 10" tonight with this exclusive story. Judge Penny Harrington says recent allegations she abused her power are being fueled by a man who she says used to stalk her. * * *

The issues presented on appeal are:

(1) whether the District Court correctly declined to address Harrington's motion to dismiss separately from her motion for summary judgment because Judge Harrington submitted the motion contemporaneously with matters outside the pleadings;

(2) whether Judge Harrington is entitled to absolute or qualified immunity for her letters to prosecuting authorities instigating an investigation of Barrett; and

(3) whether Judge Harrington is entitled to absolute or qualified immunity for the statements she made to the media accusing Barrett of stalking her.

III. STANDARD OF REVIEW

In this appeal, the Court must review both the District Court's disposition of Appellant's motion to dismiss and motion for summary judgment.

In considering a motion to dismiss for failure to state a claim, the Court is required to take as true all factual allegations in the complaint. *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1025 (6th Cir.1990), cert. denied, 498 U.S. 1086, 111 S.Ct. 961, 112 L.Ed.2d 1048 (1991). Therefore, because the District Court's disposition of the motion to dismiss is based "purely on the legal sufficiency of plaintiff's case," the proper appellate standard of review for the granting or denial the motion is de novo. *RMI*

Jay Korff: Judge Penny Harrington admits she still fears for her safety from an alleged stalker.

Titanium v. Westinghouse Electric Corp., 78 F.3d 1125, 1134 (6th Cir.1996).

Appellate review of a grant or denial of summary judgment is also de novo, utilizing the same test used by the district court to determine the appropriateness of summary judgment. *Bush v. Rauch*, 38 F.3d 842, 846 (6th Cir.1994) (citing *Deaton v. Montgomery County, Ohio*, 989 F.2d 885, 887 (6th Cir.1993)).

At the district court, summary judgment is proper " 'if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " Fed.R.Civ.P. 56(c).

Three 1986 Supreme Court cases, taken in the aggregate, lowered the movant's burden on a summary judgment motion.[5] According to the Celotex Court,

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing

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[5] *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "Taken together the three cases signal to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials." 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice & Procedure, § 2727, at 35 (1996 Supp.).

> sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322, 106 S.Ct. at 2552. In order to make a showing sufficient to resist summary judgment, the non-movant must counter with more than a mere scintilla of evidence, such that reasonable jury could find for that party. *Bailey v. Floyd County Bd. Of Ed.*, 106 F.3d 135, 140 (6th Cir.1997); *Nernberg v. Pearce*, 35 F.3d 247, 249 (6th Cir.1994).

IV. ANALYSIS

A. Denial of the Motion to Dismiss

The first issue presented on appeal is whether the District Court correctly declined to address Judge Harrington's motion to dismiss separately from her summary judgment motion because Harrington submitted the motion contemporaneously with matters outside of the pleadings. Harrington contends the District Court's procedural maneuver denied her the right to seek dismissal on the basis of immunity without having to incur the burdens of litigation. This claim is without merit.

A defendant has the right to plead immunity at the dismissal stage and may immediately appeal an adverse ruling before pleading immunity at the summary judgment stage. *Behrens v. Pelletier*, 516 U.S. 299, ___, 116 S.Ct. 834, ___, 133 L.Ed.2d 773, 784 (1996).[6] This procedural

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[6] Moreover, a defendant may appeal a denial of immunity at the summary judgment stage, even if that defendant was

safeguard exists to protect government employees from having to expend time and energy fending off vexatious claims relating to their official duties. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982) ("Inquiries of this kind can be peculiarly disruptive of effective government."). "The entitlement is an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985). Therefore, the issue of immunity should be resolved at the earliest possible stage of a litigation, *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6, 107 S.Ct. 3034, 3042 n. 6, 97 L.Ed.2d 523, 535 n. 6 (1987) (citations omitted), in order to prevent the litigant from having to endure pretrial matters such as discovery. *Forsyth*, 472 U.S. at 526, 105 S.Ct. at 2815-16.

Harrington filed both her motion to dismiss and her motion for summary judgment on the same date. These motions were filed more than four months after Plaintiff filed his original complaint, and after the parties had completed discovery. Both motions asserted the same substantive issues, and both motions were supported by a single memorandum of law which separately addressed the different forms of relief. Significantly, Harrington filed documents outside the pleadings in support of her summary judgment motion, and in opposition to Plaintiff's.

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denied immunity at the dismissal stage and was subsequently denied dismissal on appeal. *Behrens*, 516 U.S. at ___, 116 S.Ct. at ___, 133 L.Ed.2d at 788.

The District Court explained its decision to hold the motion to dismiss moot in a footnote to the opinion:

> As the defendant filed her motion to dismiss and motion for summary judgment together, the Court has before it the motions, memoranda and papers in support. Generally, a motion to dismiss under Rule 12(b)(6) is not accompanied by matters outside the pleading. Upon the submission of affidavits or others [sic] matters outside the pleading, the motion is "treated as one for summary judgment and disposed of as provided in Rule 56. . . . "
>
> Because matters outside the pleading have been presented to and considered by the Court in conjunction with the defendant's motion for summary judgment, the Court perceives no benefit in doubling its work and considering the Rule 12(b)(6) motion as well. As such, it is rendered moot and will be denied accordingly.

We find that the District Court properly found the motion to dismiss moot, and, therefore, affirm the Court's denial of the motion.

The District Court's decision is supported both by the Federal Rules of Civil Procedure and the substantive law of the above cases. It is well established that a District Court "has complete discretion to determine whether or not to accept any material beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion." 5A C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d, § 1366, pp. 491-93 (1990) (footnotes omitted). According to Rule 12(b) of the Federal Rules of Civil Procedure, once "matters outside the pleadings are presented to and not excluded by the court, the motion shall

be treated as one for summary judgment and disposed of as provided in Rule 56. . . . "

In this case, Defendant filed her summary judgment motion and her motion to dismiss simultaneously. Therefore, because Defendant filed matters outside the pleadings in support of her summary judgment motion, the court received that material contemporaneously with the motion to dismiss. The court, exercising its "complete discretion," properly decided to consider those matters when ruling on the motion. The court then acted in accordance with Rule 12 by rendering the motion to dismiss moot, as a summary judgment motion was already pending addressing the same issues.

Furthermore, the court's ruling is consistent with the progeny of immunity cases cited above. In both *Forsyth* and *Anderson*, the Supreme Court stressed the importance of shielding litigants claiming immunity from the hardships of discovery. *Forsyth*, 472 U.S. at 526, 105 S.Ct. at 2815-16; *Anderson*, 483 U.S. at 646 n. 6, 107 S.Ct. at 3042 n. 6. In this case, Defendant did not file the motion to dismiss as an initial response to the complaint. Rather, Defendant filed the motion to dismiss over four months after Plaintiff's initial complaint, long after discovery had closed. Given the procedural posture of the case, the denial of the motion to dismiss did not implicate the policy rationale underlying *Forsyth* and *Anderson*. Defendant was not exposed to any additional hardships as a result of the court's consolidation of the two motions. Based on the foregoing, it is clear that the District Court did not err in addressing the motion for summary judgment rather than the motion to dismiss.

B. Denial of Motion for Summary Judgment

1. Absolute Immunity

The second issue Harrington presents on appeal is whether the District Court erred in ruling that she was not entitled to absolute immunity. The conduct for which Judge Harrington claims immunity include: (1) writing letters to prosecutors the [sic] prompting an investigation of Barrett, and (2) statements made in interviews with the news media accusing Barrett of "stalking" her. Harrington argues that her actions "display a consistent and uncontroverted pattern of judicial conduct which is directly related to the preservation of the integrity and security of the Environmental Court and her ability to properly preside over that court, i.e., acts sufficiently within the parameters of her adjudicatory function to entitle her to absolute judicial immunity in this suit." (Appellants brief, p. 36).

The District Court denied Harrington's claim, stating:

> While it may be true that the defendant believed that she was attempting to preserve the integrity of the court, the acts represented the administrative or executive functions as opposed to adjudicative ones. [Cite omitted]. As none of the alleged violations in the present case involve actions of the defendant concerning proceedings in the courtroom or decisions concerning the plaintiff's case, the Court finds that the doctrine of absolute immunity does not apply to bar the plaintiff's claims against the defendant. [Cite omitted].

The District Court accordingly denied Defendant's motion for summary judgment claim of absolute immunity. For the reasons that follow, the District Court erred in holding the Appellant was not entitled to absolute immunity regarding her letters to prosecuting authorities, but properly ruled Defendant was not entitled to absolute immunity with regard to her statements to the media.

For centuries, the cloak of absolute judicial immunity has shielded judges from claims pertaining to actions they have taken in discharging their official duties. Judicial immunity originated in the Tenth Century, "as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error." *Forrester v. White*, 484 U.S. 219, 225, 108 S.Ct. 538, 543, 98 L.Ed.2d 555 (1988) (citing *Block, Stump v. Sparkman and the History of Judicial Immunity*, 1980 Duke L.J. 879). See also, Shaman, Lubet, & Alfini, Judicial Conduct and Ethics 2d., pp. 490-91 (1995). The modern justification for the grant of immunity is to preserve the independence of the judiciary by allowing judges to rule without fear of recourse. Immunity protects "judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants." *Forrester*, 484 U.S. at 225, 108 S.Ct. at 543.

In another context, the Supreme Court recently reiterated this policy rationale in *Clinton v. Jones*: "immunity serves the public interest in enabling such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability." ___ U.S. ___, ___, 117 S.Ct. 1636, 1643, 137 L.Ed.2d 945 (1997). The Court continued:

> As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity.

Id. at ___-___, 117 S.Ct. at 1643-44 (citing *Ferri v. Ackerman*, 444 U.S. 193, 100 S.Ct. 402, 62 L.Ed.2d 355 (1979)).[7]

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[7] See also, *Forrester*, supra at 223, 108 S.Ct. at 542 ("By its nature, however, the threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties. . . . When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct. . . . Such considerations have led to the creation of various forms of immunity."); *Ireland v. Tunis*, 113 F.3d 1435, 1440 (6th Cir.1997) (Such a far-reaching protection "is justified by a long-settled understanding that the independent and impartial exercise of judgment vital to the judiciary might by impaired by exposure to potential damages liability." (Citing *Barnes v. Winchell*, 105 F.3d 1111, 1115 (6th Cir.1997), quoting *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435, 113 S.Ct. 2167, 2171, 124 L.Ed.2d 391 (1993))). Of course, a threat of liability would encourage officials to carry out their duties lawfully, and would compensate litigants when they did not. *Forrester*, 484 U.S. at 223, 108 S.Ct. at 542. The Supreme Court's view, however, is that judicial independence and the proper administration of justice outweigh these goals. See *Mireles v. Waco*, 502 U.S. 9, 10, 112 S.Ct. 286, 287, 116 L.Ed.2d 9

As a general rule, judges are immune from suits for money damages. *Mireles v. Waco*, 502 U.S. 9, 9-10, 112 S.Ct. 286, 287, 116 L.Ed.2d 9 (1991). The Supreme Court has specifically held that state judges are absolutely immune from liability under 42 U.S.C.A. § 1983. *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1217-18, 18 L.Ed.2d 288 (1967).

Despite the reverence for judicial immunity, the Supreme Court has been "quite sparing" in their recognition of the doctrine of absolute immunity, and has refused to extend it any "further than its justification would warrant," *Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 811, 102 S.Ct. 2727, 2734, 73 L.Ed.2d (1982)),[8] and furthermore, "the official seeking the immunity bears the burden of showing that such immunity is justified for the function in question." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S.Ct. 2606, 2613, 125 L.Ed.2d 209 (1993) (citing *Burns v. Reed*, 500 U.S. at 486, 111 S.Ct. at 1939;

(1991) (Although unfairness and injustice to a litigant may result on occasion, "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.") (citing *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335, 20 L.Ed. 646 (1872)).

[8] The Court's recognition of qualified immunity makes the broad extension of absolute immunity unnecessary. *Forrester*, 484 U.S. at 224, 108 S.Ct. at 542 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90; *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 432-33 n. 4, 113 S.Ct. 2167, 2169-70 n. 4, 124 L.Ed.2d 391 (1993)).

Once immunity is established for the conduct in question, however, it "is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial." *Mireles*, 502 U.S. at 11, 112 S.Ct. at 288 (citing *Pierson*, 386 U.S. at 554, 87 S.Ct. at 1218). In fact, the immunity is overcome in only two instances:

> First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in complete absence of all jurisdiction.

Mireles, 502 U.S. at 11-12, 112 S.Ct. at 288 (cites omitted).

The Supreme Court has established a two-prong test to determine whether an act is "judicial." First, the Court must consider whether the function is "normally performed by a judge." *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1107, 55 L.Ed.2d 331 (1978).[9] This functional approach examines the "nature" and "function" of the act, not the act itself. *Mireles*, 502 U.S. at 13, 112 S.Ct. at

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[9] See also, *Jones*, ___ U.S. at ___, 117 S.Ct. at 1644 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 755, 102 S.Ct. 2690, 2704, 73 L.Ed.2d 349 (1982)); *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991); *Westfall v. Erwin*, 484 U.S. 292, 296, n. 3, 108 S.Ct. 580, 583, n. 3, 98 L.Ed.2d 619 (1988); *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988); *Malley v. Briggs*, 475 U.S. 335, 342-43, 106 S.Ct. 1092, 1097, 89 L.Ed.2d 271 (1986); *Mitchell v. Forsyth*, 472 U.S. 511, 520-23, 105 S.Ct. 2806, 2812-13, 86 L.Ed.2d 411 (1985).

288 (cite omitted).[10] Furthermore, "even if a particular act is not a function normally performed by a judge, we are directed to 'look to the particular act's relation to a general function normally performed by a judge.' " *Barnes v. Winchell*, 105 F.3d 1111, 1116 (6th Cir.1997) (quoting *Mireles*, 502 U.S. at 13, 112 S.Ct. at 288). See also, *Ireland*, 113 F.3d at 1441. Second, the court "must assess whether the parties dealt with the judge in his or her judicial capacity." *Ireland*, 113 F.3d at 1441 (citing *Stump*, 435 U.S. at 362, 98 S.Ct. at 1107-08).

The application of judicial immunity is simple and non-controversial when applied to "paradigmatic judicial acts," or acts of actual adjudication, i.e., acts involved in resolving disputes between parties who have invoked the jurisdiction of the court. *Forrester*, 484 U.S. at 227, 108 S.Ct. at 544. The touchstone for judicial immunity is the function dispute resolution, or of authoritatively adjudicating private rights. *Barnes*, 105 F.3d at 1116 (citing *Antoine*, 508 U.S. at 435-436, 113 S.Ct. at 2171) (quotation omitted). Consequently, "[a]nytime an action taken by a judge is not an adjudication between parties, it is less likely that the act is a judicial one." *Cameron v. Seitz*, 38 F.3d 264, 271 (6th Cir.1994) (citing *Morrison v. Lipscomb*, 877 F.2d 463, 466 (6th Cir.1989)).

Perhaps this cautious approach derives from the Supreme Court's decision in Forrester, in which the Court ruled that judges do not receive immunity when acting in

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[10] See also, *Buckley*, 509 U.S. 259, 269, 113 S.Ct. 2606, 2613 (1993) (the approach examines "the nature of the function performed, not the identity of the actor who performed it." (Citing *Forrester v. White*, 484 U.S. at 229, 108 S.Ct. at 545)).

administrative, legislative, or executive roles. 484 U.S. at 229-30, 108 S.Ct. at 545-46. In *Forrester*, a former probation officer filed an action against a state court judge alleging she was demoted and discharged on account of her sex in violation of the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court held that the state court judge did not have absolute immunity from damages under § 1983 for his decision to demote and dismiss the probation officer because the act was administrative, and therefore not a "judicial act." In so ruling, the Court addressed the distinction between conduct which is adjudicatory in nature and that which is administrative:

> Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been by judges. * * * This Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity. The decided cases, however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform. Thus, for example, the informal and ex parte nature of a proceeding has not been thought to imply that an act otherwise within the judge's lawful jurisdiction was deprived of its judicial character. *Stump v. Sparkman*, 435 U.S. 349, 363, n. 12, 98 S.Ct. 1099, 1108, n. 12, 55 L.Ed.2d 331 (1978). Similarly, acting to disbar an attorney as a sanction for contempt of court, by invoking a power "possessed by all courts which have authority to admit attorneys to practice," does not become less judicial by virtue of an allegation of malice or corruption of motive. *Bradley v. Fisher*, 13

> Wall. at 354, 20 L.Ed. 646. * * * Administrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts. In *Ex parte Virginia*, 100 U.S. (10 Otto) 339, 25 L.Ed. 676 (1880), for example, this Court declined to extend immunity to a county judge who had been charged in a criminal indictment with discriminating on the basis of race in selecting trial jurors for the county's courts.

Forrester, 484 U.S. at 227-28, 108 S.Ct. at 544-45.[11]

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[11] In the following cases, courts have found that the judges acted in their judicial capacity and were entitled to immunity: *Mireles v. Waco*, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991) (judge's alleged actions in directing police officers to bring attorney who was in the courthouse into his court were taken in judge's "judicial capacity" and, thus, judge was immune from § 1983 suit, even though judge allegedly directed officers to carry out order with excessive force); *Burns v. Reed*, 500 U.S. 478, 492, 111 S.Ct. 1934, 1942, 114 L.Ed.2d 547 (1991) (issuance of a search warrant is unquestionably a judicial act); *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (Indiana circuit court judge performed an act normally performed by judges in approving a mother's ex parte petition to have her 15 year old "somewhat retarded" daughter sterilized); *Sheppard v. Maxwell*, 384 U.S. 333, 358, 86 S.Ct. 1507, 1520, 16 L.Ed.2d 600 (1966) (a judge acts in a judicial capacity when exercising control of the judge's courtroom); *Ireland v. Tunis*, 113 F.3d 1435 (6th Cir.1997) (issuance of an arrest warrant was a judicial act); *Cameron v. Seitz*, 38 F.3d 264, 271 (6th Cir.1994) (state probate court judge's actions of not taking probate court employee's recommendations on disposition of juvenile cases, and barring employee's admittance into court were judicial acts and therefore subject to immunity despite the employee's allegations that judge made his decisions out of hostility arising from the employee's marriage to judge's secretary); *Sparks v. Character and Fitness Committee of Kentucky*,

This Court just recently addressed the issue of absolute immunity in *McPherson v. Kelsey*, 125 F.3d 989 (6th

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859 F.2d 428 (6th Cir.1988), *cert. denied*, 489 U.S. 1011, 109 S.Ct. 1120, 103 L.Ed.2d 183 (1989) (actions taken by State Supreme Court, and Committee on Character and Fitness in denying application for admission to state bar were judicial acts); *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir.1986) (extending judicial immunity to a judge who allegedly conspired with a prosecutor to predetermine outcome of proceeding).

In the following cases, courts have found that the judges acted outside of their judicial capacity and were not entitled to immunity: *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988) (state court judge did not have absolute immunity from damages suit under § 1983 for his decision to demote and dismiss a probation officer); *Morrison v. Lipscomb*, 877 F.2d 463 (6th Cir.1989) (state court judge was not entitled to judicial immunity in connection with order declaring moratorium on issuance of writs of restitution from December 15 through January 2, as judge was acting in administrative and not judicial capacity); *King v. Love*, 766 F.2d 962, 968 (6th Cir.), *cert. denied*, 474 U.S. 971, 106 S.Ct. 351, 88 L.Ed.2d 320 (1985) (although setting bond on an arrest warrant is a judicial act, the act of deliberately misleading the police officer who was to execute the warrant about the identity of the person sought was nonjudicial); *Sevier v. Turner*, 742 F.2d 262 (6th Cir.1984) (juvenile court judge's initiation of criminal prosecution and civil contempt proceeding against father for child support in arrears constituted nonjudicial acts); *New Alaska Development Corporation v. Guetschow*, 869 F.2d 1298 (9th Cir.1989) (receiver appointed by state court to manage business assets of an estate was entitled to absolute derivative judicial immunity, but receiver was not absolutely immune from allegations that he stole assets or slandered parties, as such alleged acts were not judicial); *Harper v. Merckle*, 638 F.2d 848 (5th Cir.), *cert. denied*, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981) (holding a contempt proceeding and ordering plaintiff incarcerated were not judicial acts where controversy that led to incarceration did not center around any matter pending before the judge, but

Cir.1997), in which McPherson brought a civil rights action against Judge Hocking for instigating an allegedly illegal stop and frisk of McPherson after a hearing in which Hocking denied him child visitation rights. Hocking's order for security to search McPherson and remove him from the building stemmed from: (1) McPherson's angry statements to a court officer and court reporter after the hearing; (2) Hocking seeing McPherson in a "Staff Only" area; (3) McPherson "lurking" outside a security door; and other such security concerns. *Id.* at 990-92. Multiple officers responded to the call and conducted a pat-down of McPherson, and a search of his briefcase before escorting him from the building. *Id.* at 991-92. Saying the issue of absolute immunity was a "close call," the panel opted not to decide that question, and instead found qualified immunity applied to Judge Hocking's conduct. *Id.* at 992.

Our opinion is a complement to the McPherson opinion. While McPherson helped to clarify the scope qualified immunity, this opinion picks up where McPherson left off and attempts to clarify the scope of absolute immunity.

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around domestic problems of plaintiff [sic] former wife who worked at the courthouse); *Harris v. Harvey*, 605 F.2d 330 (7th Cir.1979), *cert. denied*, 445 U.S. 938, 100 S.Ct. 1331, 63 L.Ed.2d 772 (1980) (allegedly repeated communications to the press and city officials which were critical of police lieutenant, and the improper instigation of criminal proceedings against the lieutenant by judge as part of a racial campaign to discredit lieutenant were not judicial acts).

(A) Letters to Prosecutors

The discrete issue presented here is whether a judge's instigation of a criminal investigation against a disgruntled litigant, taken to protect the integrity of the judicial system, is a "judicial act" and therefore entitled to absolute judicial immunity.

As noted above, the Supreme Court has formulated the two-prong functional test to determine whether an act is judicial. The first prong of the functional approach asks whether the function is one "normally performed by a judge." *Stump*, 435 U.S. at 362, 98 S.Ct. at 1107. Clearly, the instigation of a criminal investigation by the filing of a complaint is not itself a paradigmatic judicial act, i.e., an act which occurs in the context of resolving disputes between two parties. *Forrester*, 484 U.S. at 227, 108 S.Ct. at 544. Beyond the actual rendering of judgments, orders, and other acts of actual adjudication, examples of acts which are directly involved in judicial decision making include ordering police to bring an attorney before the judge,[12] approving a petition relating to the sterilization of a minor,[13] disbarring an attorney as a sanction,[14] issuing a search warrant,[15] controlling the courtroom,[16] and issuing an arrest warrant.[17] Thus, the act of writing a

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[12] *Mireles*, 502 U.S. 9, 112 S.Ct. 286.

[13] *Stump*, 435 U.S. 349, 98 S.Ct. 1099.

[14] *Bradley*, 13 Wall. at 354.

[15] *Burns*, 500 U.S. 478, 111 S.Ct. 1934.

[16] *Sheppard*, 384 U.S. 333, 86 S.Ct. 1507.

[17] *Ireland*, 113 F.3d 1435.

letter of complaint to prosecuting authorities is distinguishable from these acts, as this type of conduct can, and usually is, undertaken by a citizen complainant or law enforcement personnel. Furthermore, the instigation of criminal proceedings, by definition, is not adjudicatory in nature and does not resolve a dispute between two parties, but rather initiates one.

However, the functional approach focuses on "the nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269, 113 S.Ct. at 2613-14. See also, *Mireles*, 502 U.S. at 13, 112 S.Ct. at 288-89; *Forrester*, 484 U.S. at 229, 108 S.Ct. at 545. This process necessitates abstracting the nature of the act from the particular act at issue, i.e., looking at "the particular act's relationship to a function normally performed by a judge." *Barnes*, 105 F.3d at 1116 (quoting *Mireles*, 502 U.S. at 13, 112 S.Ct. at 288-89) (emphasis added). For example, in *Mireles*, the particular act was the judge's order for the police officers to bring the attorney before him, with excessive force. In reviewing the claim of immunity, the Court's focus was on the more general act of ordering counsel before the court, rather that the issue of the use of force. *Mireles*, 502 U.S. 9, 112 S.Ct. 286.

In *Martinez v. Winner*, the Tenth Circuit addressed the scope of judicial immunity regarding several highly questionable acts by Judge Fred Winner, (then) the Chief Judge of the United States District Court for the District of Colorado, in *Francisco Martinez's* criminal prosecution.[18] 771 F.2d 424 (10th Cir.1985). One of these unusual

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[18] *Martinez* was vacated and remanded by *Tyus v. Martinez*, 475 U.S. 1138, 106 S.Ct. 1787, 90 L.Ed.2d 333 (1986), to determine

acts was Judge Winner's assignment of the *Martinez* case to himself, in contravention of local practice and rules, allegedly to insure a conviction. *Martinez*, 771 F.2d at 434. The Tenth Circuit denied Martinez's contention that the assignment of the case was an administrative act, rather than a judicial act:

> Although it is an "administrative" act, in the sense that it does not concern the decision who shall win a case, the assignment of cases is still a judicial function in the sense that it concerns the case deciding process, and by statute it is the responsibility of the chief judge, Judge Winner in this case.

Martinez, 771 F.2d at 434.

In this case, Judge Harrington's letters to prosecutors did not concern whether Mr. Barrett would win or lose the case. However, the letters did involve the "case deciding process," as the Judge wrote to express her fear that the harassment would cause her to have to recuse herself from future cases involving Mr. Barrett – recusal is undoubtedly an act that concerns judicial decision-making.

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whether the case had become moot because the plaintiff had directed his counsel to withdraw from actively litigating the case. *Martinez* was reversed in non-relevant part by *Martinez v. Winner*, 778 F.2d 553 (10th Cir.1985). Because this Court only looks to the case as persuasive authority, it is irrelevant that the case has been vacated; the case occurred in the Tenth Circuit and therefore this Court would not be bound by the decision even if it had not been vacated. Furthermore, the case was recently cited in *McPherson v. Kelsey*, 125 F.3d 989, 992 (6th Cir.1997).

Judge Winner also wrote letters to the Justice Department and other law-enforcement officials accusing Martinez of being the catalyst for bringing together terrorist groups, and charging that he was obstructing justice. The court ruled that Judge Winner was entitled to immunity for writing the letters because he "had a duty to notify the proper authorities if he felt a crime was being committed in his courtroom." *Martinez*, 771 F.2d at 435.

In this case, it makes no difference that Barrett's alleged obstruction occurred outside the courtroom; if the alleged intimidation of jurors in Martinez occurred in their homes rather than in the court, the conduct still would have amounted to obstruction. Nor does it matter that the intimidation was directed towards a judge, rather than a juror – an intimidation of a judge serving as the trier of fact is equally as obstructive as intimidation of jurors. If Judge Harrington believed Mr. Barrett's actions amounted to obstruction she had a duty to report to the proper authorities, and therefore she must be immune from liability for doing so.[19]

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[19] Furthermore, during Martinez's trial, Judge Winner held a secret meeting with the United States Attorneys, at which time the Judge expressed apprehension that the jury was being intimidated by spectators, and that Martinez might be acquitted. *Martinez*, 771 F.2d at 432-433. The Judge stated he wanted cameras installed in the courtroom to record the intimidation, which he felt constituted obstruction of justice, and agreed with the prosecutors that a mistrial would be declared. *Id.* The Tenth Circuit ruled:

> If a judge feels a jury is being intimidated by spectators, it is his responsibility to notify proper law enforcement agencies and have the possible crime investigated. A judge is not only entitled but also has

The particular conduct in question here is the letters Judge Harrington wrote to state and federal prosecutors which prompted an allegedly spurious investigation into whether Barrett was attempting to obstruct justice. Bearing in mind that Judge Harrington was told by Joan Nixon and Larry Brinton that Barrett was acting in a hostile and threatening manner towards her, and that both had expressed concern for her safety, Judge Harrington clearly had reasonable grounds to contact District Attorney General Johnson and United States Attorney Roberts on her judicial letterhead to prompt an investigation into obstruction of justice charges. Judge Harrington's letter stated in pertinent part:

> I wish to request a formal investigation by your office of Frank Barrett of Nolensville, Tennessee. It is my belief that Mr. Barrett who is a roofing contractor and who has been a defendant before me in a suit by Metropolitan Government charging him with failure to obtain permits before working on a roof, is attempting to obstruct justice by harassing me and my family. The purpose of the harassment is to create circumstances that would appear to require me to recuse myself from cases enforcing the Metropolitan Codes against him.
>
> On information and belief, Mr. Barrett or his agents, have trespassed at my home and have followed me and my husband. Not only do I believe there is obstruction of justice, I am also

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a duty to take all lawful measures reasonably necessary to prevent the occurrence of a crime in his courtroom.

Martinez, 771 F.2d at 435.

> fearful of Mr. Barrett, based upon his erratic and threatening behavior in the various offices he has visited.

(J.A. p. 135) (emphasis added).

The District Court found Judge Harrington was "prompted by her fear that in her role as a judge, she had aggravated a litigant such that he had developed a personal vendetta against her and that she was acting to preserve the integrity of the judicial system." (Memorandum of the Court, p. 9).

After stripping Judge Harrington's act of its particularities and peculiarities, we find the general function of Judge Harrington's conduct in writing to the prosecuting authorities was to protect the integrity of the judicial decision-making process. Clearly, there was a direct relational nexus between Harrington's judicial decisions, Barrett's response in "investigating" and threatening her, and Harrington's response in contacting the prosecuting attorneys. Based upon what Ms. Nixon and Mr. Brinton told her that Barrett had said about her, and their expression of concern for her safety arising out of his conduct, Judge Harrington understandably felt threatened by Barrett's statements, and the letters she wrote to the prosecutors were clearly designed to address and deter such conduct, and directly related to her role in adjudicating the case which engendered Barrett's conduct in the first place. Just as a judge's citation for contempt against a party who obstructs justice is a judicial act taken to preserve integrity of the judicial system, so too is the instigation of criminal proceedings against a disgruntled

litigant whose conduct may amount to obstruction.[20] It would make little sense, and only promote form over substance, for us to say that a judge's response in redressing threatening conduct which she physically observes (e.g., contempt) is entitled to the cloak of judicial immunity, but her action in redressing a threat arising in reaction to her adjudicatory actions which she is told of by others is not entitled to the same level of immunity. The import is in the nexus between the Judge's action which gave rise to the threat and her response to the threat, not simply the response itself.

We, therefore, hold that in circumstances in which a judge reasonably perceives a threat to himself or herself arising out of the judge's adjudicatory conduct, the judge's response, be it a letter to a prosecutor or a call to the Marshall's office for security, is a judicial act within the scope of judicial immunity.

Thus, we must reject the District Court's conclusion that Judge Harrington sent her letters to prosecutors in an administrative capacity, rather than a judicial one. The District Court ruled that act was administrative because it

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[20] Plaintiff alleges that Judge Harrington's motives were taken out of bad faith because she allegedly knew the stalking statute did not apply to Barrett's conduct. This allegation does not undermine the application of immunity for several reasons: first, although Harrington alluded to the stalking law in her letters, she specifically complained of obstruction of justice in relation to her role as a judge; second, because of the functional analysis we do not focus on the particulars of the act; third, the Supreme Court has clearly ruled that immunity "is not overcome by allegations of bad faith or malice. . . . " *Mireles*, 502 U.S. at 11, 112 S.Ct. at 287-88.

did not involve courtroom proceedings or decisions concerning Mr. Barrett's case. (Memorandum of the Court, p. 11). However, the applicability of judicial immunity is not limited to acts which occur within the confines of the courtroom, and consequently, acts performed outside of the courtroom are not, ipso facto, non-judicial acts.

The second prong of the functional approach assesses "whether the parties dealt with the judge in his or her judicial capacity." *Ireland*, 113 F.3d at 1441. As noted above, the District Court ruled Judge Harrington's action did not involve decisions concerning Mr. Barrett's case. However, Barrett's entire course of conduct was focused on Harrington's judicial role. First, he dealt with Harrington in her judicial capacity when she presided over Barrett's case involving two codes violations, and it was at that time that Barrett formulated his opinion that Judge Harrington was unfit to hold office, and began his "investigation" campaign. Second, all of his activities, from his "investigation" campaign, to his comments to others about her, to the disclosure to the media of her ticket dismissals, were in response to her judicial decisions and conduct. Given this chain of related activities, Barrett clearly dealt with Judge Harrington in her judicial capacity.

As the Supreme Court has noted, the doctrine of judicial immunity exists to ensure that, in discharging their official responsibilities, judges will act without fear for their personal liability. *Clinton*, ___ U.S. at ___ - ___, 117 S.Ct. at 1643-44; *Forrester*, 484 U.S. at 223, 108 S.Ct. at 542. If a disgruntled litigant is permitted to upset that equilibrium by threatening or harassing a judge and the judge must fear personal liability if he or she reports that

harassment to authorities, the judges's [sic] ability to deal impartially and without fear will be seriously undermined. Even more to the point, the litigant, empowered to subject the judge to liability for reporting the conduct, can affect the judge's ability to sit on cases involving that litigant, thereby effectively creating a situation wherein the litigant will not have to answer to that judge or even appear before the judge.[21] This enables the litigant to "forum shop" by effecting the recusal of a judge through the litigant's own threatening or harassing conduct.

If the judge were not free to address this conduct by complaining to law enforcement without fear of liability, the judge's freedom of action in insuring the integrity of his or her decision-making process, and, indeed, his or her decisions themselves, will be jeopardized. Any result which did not extend immunity to judges acting to protect the integrity of the judicial decision-making process would seriously undermine judicial independence, a cornerstone of a judge's capacity to sit and decide cases.

Therefore, because Harrington dealt with Barrett in her judicial capacity, and because we find that a judge instigating a criminal investigation against a disgruntled litigant who has harassed her is a judicial act, we find that Judge Harrington is entitled to absolute judicial immunity regarding her statements to prosecuting authorities.[22]

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[21] Indeed, in this case, Judge Harrington ultimately felt compelled to recuse herself in a subsequent proceeding involving Plaintiff.

[22] Because we hold that Judge Harrington is entitled to absolute immunity here, we need not address the issues of

(B) Statements to the News Media

The next discrete issue presented on appeal is whether Judge Harrington's allegedly false statements to the media qualify for absolute judicial immunity.

It is well-settled that the making allegedly false statements to the news media does not qualify as a judicial act. In *Buckley*, a murder defendant against whom charges [sic] been dropped, brought a § 1983 action against prosecutors claiming malicious prosecution. Among his various claims, *Buckley* claimed that during the prosecutor's public announcement of the indictment, State's Attorney Fitzsimmons made false assertions about numerous pieces of evidence which tied him to the murder. The Court ruled that Fitzsimmons statements to the media were not entitled to absolute immunity. The Court reasoned that, under the functional approach, statements to the media "have no functional tie to the judicial process just because they are made by a prosecutor." *Buckley*, 509 U.S. at 277, 113 S.Ct. at 2617-18.[23] The Court clarified the scope of absolute immunity with regard to defamatory statements:

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qualified immunity which this case presents. Suffice it to say, however, that even if absolute immunity did not apply, qualified immunity would certainly apply to Judge Harrington's letters to prosecutors. See, e.g., *McPherson*, 125 F.3d at 993-94 (judges instigation of a stop and frisk of a disgruntled litigant was objectively reasonable, and therefore entitled to qualified immunity).

[23] The Court further stated: "The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory to these functions." *Buckley*, 509 U.S. 259, 113 S.Ct. 2606.

> [Absolute immunity] does not apply to or include any publication of defamatory matter before the commencement, or after the termination of the judicial proceeding (unless such publication is an act incidental to the proper initiation thereof, or giving legal effect thereto); nor does it apply to or include any publication of defamatory matter to any person other than those to who, or in any place other than that in which, such publication is required or authorized by law to be made for the proper conduct of the judicial proceedings.

Buckley, 509 U.S. at 277 n. 8, 113 S.Ct. at 2618 n. 8 (citing *Veeder, Absolute Immunity in Defamation*: Judicial Proceedings, 9 Colum.L.Rev. 463, 489 (1909) (footnotes omitted)). See also, *New Alaska Development Corporation v. Guetschow*, 869 F.2d 1298 (9th Cir.1989) (holding that while a receiver appointed by the court to manage an estate was entitled to judicial immunity from suit claiming mismanagement, receiver was not absolutely immune from allegations that he stole assets or slandered the plaintiff).

In *Harris v. Harvey*, the Fifth Circuit ruled that a judge was not immune from liability stemming from allegedly slanderous statements made to the news media accusing the plaintiff of criminal conduct. 605 F.2d 330 (6th Cir.1979). The judge seeking immunity made repeated communications to the press and city officials over the course of more than a year, including calling the plaintiff "a fixer, a briber, and a sycophant." *Harris*, 605 F.2d at 334. The court ruled that, "[s]uch acts were not judicial because they were not functions normally performed by a judge, and were not "to the expectations of the parties" in

that as to these acts the parties did not deal with him in his judicial capacity. . . . " *Harris,* 605 F.2d at 336.

Similarly, Judge Harrington's statements to the media cannot be said to be related to her duties as a judge. Even in the abstract, speaking to the media and giving interviews about a litigant on a case over which the judge has presided is not normally a judicial function nor is it usually in furtherance of a judicial function. Indeed, many, if not most, judges will not speak to the media concerning cases of litigants who have appeared before them. Unlike filing a complaint with law enforcement concerning a disgruntled litigant who is harassing a judge, speaking to the media concerning that litigant in no way protects the integrity of the judicial institution or the decision-making process. Although it is an understandable human instinct to defend one's self in the media when attacked publicly, such a defense is not a judicial function – it is self-defense. The distinction here is a clear one. When a judge makes a complaint to law enforcement concerning a litigant's conduct which is adversely affecting or obstructing the judicial process, that judge is requesting some official action in connection with the judicial process. In contrast, an interview with the media concerning the litigant furthers no official act or sanction, it simply informs the public about the judge's position or views.

Therefore, when Judge Harrington communicated to the media regarding Mr. Barrett, she stepped out of her judicial role, and is not entitled to absolute judicial immunity for those acts.

2. Qualified Immunity

The next issue presented on appeal is whether the District Court erred in ruling that Judge Harrington was not entitled to qualified immunity for liability under § 1983 stemming from the allegedly false statements she made to the media in retaliation for Barrett's investigation of her.[24]

Mr. Barrett alleges Judge Harrington "unlawfully retaliated against him for lawfully gathering damaging information from a variety of sources of public information in order to oppose the Defendant's future political endeavors, which information included evidence of the Defendant's criminal conduct in office, and the Defendant again unlawfully retaliated when the plaintiff disclosed evidence of the Defendant's criminality to a news reporter." (Appellee's Brief, p. 10). Specifically, Mr. Barrett complains of statements originating from an interview Judge Harrington had with Nashville Banner reporter Toni Dew, which took place in the Judge's office, in which Harrington discussed the parking tickets and stated that Barrett had been stalking, harassing, and otherwise intimidating her. (J.A., pp. 303-11). Plaintiff also complains of a September 12, 1995, interview with a reporter for WKRN Channel 2 News, who showed up on Harrington's doorstep and interviewed Harrington at her

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[24] Because we ruled that Judge Harrington is entitled to absolute immunity from liability for statements she made to prosecutors, we need not address whether she was entitled to qualified immunity for the same conduct. Therefore, the only issue remaining is whether she is entitled to qualified immunity for her statements to the media. See footnote 23, supra.

home. (J.A., p. 312). This interview, which appeared on the evening news that same day, quotes Harrington as stating that Barrett was stalking her and that she felt threatened and intimidated by him. (J.A., pp. 180-81).[25] Harrington claims she is entitled to qualified immunity from the claim that her statements constituted a retaliation in violation of 42 U.S.C. § 1983.

Before determining whether Judge Harrington is entitled to qualified immunity, we must first examine whether Mr. Barrett properly alleged a violation of 42 U.S.C. § 1983. We articulated the test for determining whether a governmental action was taken in retaliation for First Amendment speech in *Ratliff v. Wellington Exempted Village Schools Board of Education*, 820 F.2d 792 (6th Cir.1987). In *Ratliff*, which involved the alleged retaliatory firing of a public employee, we stated:

> The parties agree that under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), if a public employee alleges that his employer took adverse action against him in retaliation for his exercise of first amendment rights, the following analytical approach must be applied:
>
> (1) The threshold question is whether the plaintiff's conduct deserves constitutional protection.
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> (2) If the court finds that an employee's conduct was protected by the first amendment, the finder of fact must determine whether the action

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[25] See footnotes 4 and 5, supra, for text of the statements Judge Harrington made to the media.

> taken was because he engaged in the protected conduct. The employee's protected conduct must be a "substantial factor" or a "motivating factor" in the employer's decision.
>
> (3) Once the employee meets this burden, the burden shifts to the employer to prove that the actions the employee is complaining about would have taken place absent the protected conduct.

Ratliff, 820 F.2d at 795 (6th Cir.1987). See also, *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, ___ U.S. ___, ___, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843 (1996).

Using this approach, the first issue is whether Mr. Barrett himself engaged in constitutionally protected conduct. *Ratliff*, 820 F.2d at 795. Barrett argues that his criticism of Judge Harrington, and his exposure of her wrongdoing is protected by the First Amendment. He is clearly on sound constitutional ground here. "Criticism of government is at the very center of the constitutionally protected area of free discussion." *Rosenblatt v. Baer*, 383 U.S. 75, 85, 86 S.Ct. 669, 675-76, 15 L.Ed.2d 597 (1966).[26] Mr. Barrett's opinion and consequent criticism of Judge Harrington is conduct that falls well within the ambit of

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[26] See also, *Bridges v. California*, 314 U.S. 252, 270, 62 S.Ct. 190, 197, 86 L.Ed. 192 (1941) ("It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.").

the First Amendment's protections.[27] Freedom to criticize public officials and expose their wrongdoing is at the core of First Amendment values, even if the conduct is motivated by personal pique or resentment.[28]

Having found Barrett's conduct protected, we next inquire into whether Barrett's First Amendment conduct was a "substantial" or "motivating" factor in Judge Harrington's conduct, and, if so, whether she has put forth any evidence to prove her conduct would have taken place absent the protected conduct. Nothing in the record suggests that Judge Harrington would have told the media that Barrett was stalking her if Barrett had not begun to investigate and criticize her. She admitted in deposition that in her legal opinion Barrett was not violating the stalking laws, yet she repeatedly accused him of stalking her in the media. According to the deposition testimony of Harrington's colleague, Judge William Higgins, Harrington loudly told Higgins that Barrett was stalking her and shouted, "Your friend Frank Barrett is a fruitcake." Higgins described Harrington's demeanor in making each of these statements as "very angry and red-

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[27] As noted, Barrett formed his belief during his hearing that she was "arrogant and irascible." (J.A., p. 30). Based on this belief, Barrett determined that Harrington was not "fit . . . to hold public office" and decided to investigate her in order to advocate opposition to her re-election. *Id.*

[28] Obviously, if the conduct spills over into illegal activities such as threats or harassment that amount to the obstruction of justice, the First Amendment's protections end, and the official may respond with appropriate sanctions, including reporting to law enforcement. See discussion supra, concerning a judge's absolute immunity to report possible illegal conduct.

faced and angry at me, sort of venomous." These statements reveal the possibility that in speaking to the media, Harrington did have a retaliatory motive to publicly humiliate and denigrate Barrett. These inferences raised by the evidence of record to date are sufficient to create a question of fact and avoid summary judgment for Judge Harrington.

Having ruled that Barrett presented enough evidence to survive summary judgment on the actual violation, the inquiry now turns to determination of whether Judge Harrington is entitled to qualified immunity. In cases in which absolute immunity does not apply, "qualified immunity may nonetheless shield a public official from civil liability under § 1983." *Cameron*, 38 F.3d at 272. Qualified immunity protects government employees from liability for the performance of their discretionary functions when they meet the objective legal reasonableness test. The Supreme Court has articulated the test as follows:

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982) (citing *Procunier v. Navarette*, 434 U.S. 555, 565, 98 S.Ct. 855, 861, 55 L.Ed.2d 24 (1978) (emphasis added)); *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1001, 43 L.Ed.2d 214 (1975); *McPherson*, 125

F.3d at 992.[29] The *Harlow* Court "adopted this criterion of "objective legal reasonableness," rather than good faith, precisely in order to "permit the defeat of insubstantial claims without resort to trial." " *Behrens*, 516 U.S. at ___, 116 S.Ct. at 838 (citing *Harlow*, 457 U.S. at 819, 813, 102 S.Ct. at 2739, 2735-2736).

To survive Defendant's assertion of qualified immunity, Barrett must show that, under § 1983, Harrington's conduct: (1) violates Barrett's clearly established constitutional rights, (2) of which a reasonable person would have known. *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738. A right is clearly established if there is binding precedent from the Supreme Court, the Sixth Circuit, or the district court itself, *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir.1994), or case law from other circuits which is directly on point, *Cameron*, 38 F.3d at 272-73 (citing *Mumford v. Zieba*, 4 F.3d 429, 432 (6th Cir.1993)). As stated above, it is evident that

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[29] As the District Court noted, there are a number of ways a public official can establish a defense of qualified immunity.

> First, qualified immunity will be sustained if the parameters of the federal right at issue were not sufficiently clear at the time the defendant acted. See *Procunier v. Navarette*, 434 U.S. 555, 564, 98 S.Ct. 855, 861, 55 L.Ed.2d 24 (1978). Second, if the interest asserted by the plaintiff was clearly protected by federal law, but it was not clear whether an exception permitted the defendant's acts, the defendant is entitled to immunity. *Forsyth*, 472 U.S. at 535 n. 12, 105 S.Ct. at 2820 n. 12. Third, the defendant is entitled to immunity is [sic] she can show that "it was objectively reasonable for [her] to believe that [her] acts did not violate those rights," even if the parameters of the plaintiff's rights were clearly established. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).
>
> (Memorandum of the Court, p. 13).

the First Amendment right to criticize public officials is well-established and supported by ample case law. Furthermore, it is well established that a public official's retaliation against an individual exercising his or her First Amendment rights is a violation of § 1983. See e.g., *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, ___ U.S. ___, ___, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843 (1996) ("The First Amendment's guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern."); *Mt. Healthy City Bd. Of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).[30]

Not only is this right clearly established, but Harrington knew or should have known that she may have been violating Barrett's First Amendment rights when she accused him of stalking to reporters from the Nashville Banner and WKRN Channel 2 News. Harrington stated in her deposition that she had reviewed the applicable stalking statute and determined it did not apply to Barrett's conduct. Despite this admission, Harrington repeatedly accused Barrett of stalking her in the media, apparently to counteract Barrett's consistent public criticism of her.

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[30] See also, *McBride v. Village of Michiana*, 1994 WL 396143 (6th Cir.) (unpublished disposition) (citing *Georgia Ass'n of Educators v. Gwinnett County School Dist.*, 856 F.2d 142 (11th Cir.1988) (denial of union dues checkoff privileges in retaliation for First Amendment activity is actionable); *Rakovich v. Wade*, 850 F.2d 1180 (7th Cir.1988), *cert. denied*, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 534 (1988) ("an investigation conducted in retaliation for comments protected by the first amendment could be actionable under section 1983")).

Harrington's statements to the press fail the objective legal reasonableness test because her conduct violated clearly established First Amendment rights of which a reasonable person in her position would have been cognizant. Therefore, we affirm the District Court's ruling not to grant summary judgment to Judge Harrington on the basis of qualified immunity.[31]

V. CONCLUSION

In conclusion, we REVERSE the District Court's ruling that Judge Harrington was not entitled to absolute judicial immunity for letters she wrote to prosecuting authorities requesting an investigation of Barrett's potential obstruction of justice. We hold that a judge is entitled to absolute immunity when contacting prosecutors to prompt an investigation of conduct by a disgruntled litigant which may constitute obstruction of justice in connection with an action or decision taken or made by the judge in his or her adjudicatory capacity. We AFFIRM the District Court's ruling that Judge Harrington was not entitled to absolute immunity for her statements to the media, because such statements are not judicial acts. We also AFFIRM the District Court's ruling that Judge Harrington was not entitled to qualified immunity for her statements to the media.

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[31] Although not raised by the parties on appeal, we direct their attention, and that of the District Court, to the question of whether Judge Harrington was, in making her statements to the media, acting "under color of law" for the purposes of § 1983.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FRANK BARRETT	]	
	]	No. 3-95-0914
v.	]	Judge Higgins
NANCY I. HARRINGTON	]	
	]	

ORDER

(Filed 7/31/96)

In accordance with the memorandum contemporaneously entered, the defendant's motion (filed February 14, 1996; Docket Entry No. 19) for summary judgment is granted in part and denied in part; and her motion (filed February 14, 1996; Docket Entry No. 18) to dismiss is dismissed as moot.

The plaintiff's motion (filed February 14, 1996; Docket Entry No. 24) for partial summary judgment is denied in its entirety.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
7-30-96/

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FRANK BARRETT	]	
	]	No. 3-95-0914
v.	]	Judge Higgins
NANCY I. HARRINGTON	]	
	]	

MEMORANDUM

(Filed 7/31/96)

The Court has before it the defendant's motions to dismiss[1] and for summary judgment (filed February 14, 1996; Docket Entry Nos. 18 and 19); memorandum (Docket Entry No. 20) in support of both dispositive motions; and the plaintiff's memorandum (filed February 26, 1996; Docket Entry No. 33) in opposition to the defendant's motion to dismiss and memorandum (filed March

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[1] As the defendant filed her motion to dismiss and motion for summary judgment together, the Court has before it the motions, memoranda and papers in support. Generally, a motion to dismiss under Rule 12(b)(6) is not accompanied by matters outside the pleading. Upon the submission of affidavits or other matters outside the pleading, the motion is "treated as one for summary judgment and disposed of as provided in Rule 56. . . ."

Because matters outside the pleading have been presented to and considered by the Court in conjunction with the defendant's motion for summary judgment, the Court perceives no benefit in doubling its work and considering the Rule 12(b)(6) motion as well. As such, it is rendered moot and will be denied accordingly.

5, 1996; Docket Entry No. 37) in opposition to the defendant's motion for summary judgment. The Court also has before it the plaintiff's motion (filed February 14, 1996; Docket Entry No. 24) for partial summary judgment; memorandum (Docket Entry No. 27) in support and the defendant's response and memorandum (filed March 7, 1996; Docket Entry Nos. 39 and 40) in opposition.

The Court has subject matter jurisdiction over the plaintiff's claims under 28 U.S.C. §§ 1331 and 1343.

For the reasons discussed below, the defendant's motion to dismiss shall be denied as moot and her motion for summary judgment shall be granted in part and denied in part. The plaintiff's motion for partial summary judgment shall be denied.

I.

Frank Barrett originally filed this action on September 21, 1995, (Docket Entry No. 1), against the defendant, Nancy I. Harrington. The plaintiff alleges, pursuant to the provisions of 42 U.S.C. § 1983, that he is entitled to recover damages from the defendant for violations of his First and Fourteenth Amendment rights. He also asserts a pendent state law claim of defamation under Tennessee common law.[2]

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[2] Mr. Barrett voluntarily dismissed claims four through nine at the pretrial conference held on June 10, 1996. These claims are therefore dismissed from this action. *See* pretrial order entered June 18, 1996 (Docket Entry No. 46).

This action arises from an ongoing, well-publicized conflict between the parties.[3] Mr. Barrett owns a contracting business and has been involved in a controversy with the Department of Codes Administration of the Metropolitan Government of Nashville and Davidson County regarding work permits for various projects. The defendant is a general sessions judge of Nashville and Davidson County. The hearings in which the plaintiff has been involved were before the environmental court, over which the defendant presides.

Mr. Barrett began to investigate the defendant after a September, 1994, bench trial regarding alleged codes violations, in which the defendant found against Mr. Barrett. The plaintiff alleges that the defendant was "unusually arrogant and irascible . . . and failed to show appropriate respect for litigants appearing before her." Second amended complaint (filed February 8, 1996; Docket Entry No. 15) at ¶ 11. Based on his observations, the plaintiff determined that the defendant was not "fit . . . to hold public office" and decided to investigate her in order to advocate opposition to her re-election. *Id.* at 3-4.

During the course of his investigation, the plaintiff visited a number of government offices collecting public records, such as election commission records, special judge records and traffic citations. The defendant asserts

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[3] While the Court is aware that this has been a very heated and public conflict, it should be remembered that memoranda of law for disposition by the Court are not an appropriate vehicle for further name calling and petty barbs. *See* plaintiff's memorandum in support of response (Docket Entry No. 37) at 11.

that she became fearful of the plaintiff after she was informed that he exhibited violent and threatening behavior during his investigation in various public offices. Deposition of defendant (filed February 14, 1996; Docket Entry No. 29) at 46-47. The defendant states that as a result of her fear of Mr. Barrett and her belief that he was attempting to obstruct justice by harassing her, she wrote letters documenting the events to the District Attorney General, Victor Johnson, III, and the United States Attorney, John Roberts. She also informed the Metropolitan Police Department of her concerns. Despite her alleged fears, however, the defendant did not attempt to have a criminal warrant issued against Mr. Barrett.

In September, 1995, Mr. Barrett informed members of the local media that he believed the defendant had "unlawfully dismissed parking citations issued against her and/or her husband." Docket Entry No. 15 at ¶ 26. This revelation caused a stir in the local media and the story was widely publicized. Shortly thereafter, some local media representatives reported that the defendant said the plaintiff was stalking her and that she felt she was in danger. *See* appendix (filed February 14, 1996; Docket Entry No. 22), exhibits G and H.

The plaintiff asserts that he posed no threat to the safety of the defendant and that she made her allegations against him knowing that they were false, in retaliation for his efforts in revealing her conduct and reputation as an elected official. He further asserts that he has suffered humiliation and mental anguish and that his business has suffered as a result of the defendant's allegations.

The plaintiff moves for partial summary judgment (Docket Entry No. 24). He asserts that there are no material facts in dispute with regard to his claims that the defendant unlawfully retaliated against him for the exercise of his First Amendment rights by making false accusations to law enforcement authorities and disseminating false and defamatory statements to members of the local media. Specifically, Mr. Barrett asserts that the defendant accused him of stalking her after he began investigating her affairs and spoke out against her publicly. He claims that the defendant knew that the accusations of stalking were groundless and make them out of animosity and ill will, in an attempt to punish the plaintiff for the exercise of his rights of free speech. Docket Entry No. 27 at 7-10.

Additionally, Mr. Barrett asserts he is entitled to judgment as a matter of law on his claim that the defendant deprived him of liberty and/or property without due process of law. *Id.* at 11. He states that the defendant has injured his business reputation, which is recognized as a property interest by the State of Tennessee and a liberty interest under the Fourteenth Amendment. *Id.* at 12.

The plaintiff also asserts that there are no genuine issues of material fact as to his claim that the defendant is liable under Tennessee common law for defamation, entitling the plaintiff to summary judgment on that issue. *Id.* at 15-16. Mr. Barrett contends that the defendant's accusations of stalking, taken in their "plain and natural" import, can only be construed as libelous by the Court. *Id.*

The defendant moves for judgment as a matter of law (Docket Entry No. 19) based on her belief that judicial

and/or qualified immunity shields her from liability in this action. The defendant asserts that the Court should dismiss the plaintiff's action for lack of jurisdiction because the plaintiff has not established that the defendant acted "under color of law." Docket Entry No. 20 at 2-4. Furthermore, the defendant contends that Mr. Barrett has failed to state a claim upon which relief can be granted because he has not provided facts which indicate a violation of his constitutional rights. *Id.* at 5. The defendant contends that even if she is not entitled to absolute judicial immunity, her actions exhibited the considered actions of a reasonable public official under the circumstances and, thus, merit the protective shield of qualified immunity. *Id.*

II.

Summary Judgment

As provided by Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202, 211 (1986). In its consideration of the evidence, the Court must view all facts and inferences to be drawn therefrom in the light most favorable to the non-moving party. *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1349 (6th Cir. 1991).

In order to prevail on a summary judgment motion, the moving party bears the burden of proving the absence of a genuine issue of material fact concerning an essential element of the opposing party's action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 274 (1986); *Davidson & Jones Dev. Co.*, 921 F.2d at 1349; *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). A dispute about the material fact must be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the non-moving party."[4] *Liberty Lobby*, 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211-12. Since the preponderance of the evidence standard is used in this determination, more than a mere scintilla of evidence in support of the plaintiff's position is required. *Id.* at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.

Once a motion for summary judgment has been made, "the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e)." *Davidson & Jones Dev. Co.*, 921 F.2d at 1349. The non-moving party may not merely rest on conclusory allegations contained in the complaint, but must respond with affirmative evidence supporting its claims and establishing the existence of a genuine issue of material fact. *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553, 91 L.Ed.2d at 274; *Cloverdale Equip. Co. v. Simon Aerials, Inc.*,

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[4] The Supreme Court further explained that a court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-52, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.

869 F.2d 934, 937 (6th Cir. 1989). While the disputed issue does not have to be resolved conclusively in favor of the non-moving party to defeat summary judgment, "sufficient evidence supporting the claimed factual dispute" must be shown, thereby requiring resolution of the parties' differing versions of the truth by a jury or judge. *Liberty Lobby*, 477 U.S. at 249, 106 S.Ct. at 2510, 91 L.Ed.2d at 212; *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569, 592 (1968).

III.

Defendant's Motion for Summary Judgment

A. Under Color of Law

In order to bring a claim under 42 U.S.C. § 1983, the plaintiff must establish that the defendant was acting "under color of [state] law" when she engaged in the conduct at issue. *Parratt v. Taylor*, 451 U.S. 527, 536, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420, 429 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). The Supreme Court of the United States has defined the phrase "under the color of [state] law" as "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. . . . " *Monroe v. Pape*, 365 U.S. 167, 184, 81 S.Ct. 473, 482, 5 L.Ed.2d 492, 503 (1961), *overruled on other grounds by Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

The plaintiff does not assert that the defendant is liable for any conduct engaged in while she was in a judicial setting or in her adjudicatory role but contends that she acted under color of law when she contacted law

enforcement officials and spoke with the media concerning his conduct. A judge may be "clothed with the authority of state law" while engaging in a number of activities. *See McBride v. Village of Michiana*, 1994 WL 396143 (6th Cir.) ("Generally, a public employee acts under the color of state law while serving in her official capacity or exercising her responsibilities pursuant to state law." (citing *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988))).

One of the responsibilities of a judge is to ensure the orderly progression of cases through the justice system. In her letters to Mr. Roberts and General Johnson, the defendant stated that she was concerned about the plaintiff attempting to obstruct justice. Docket Entry No. 20 at 16. The defendant has also stated that she used her judicial stationery in writing to Mr. Roberts and General Johnson because she "was a judge asking for protection from a disgruntled litigant." Docket Entry No. 29 at 108. The Court finds that these communications were prompted by her fear that *in her role as a judge*, she had aggravated a litigant such that he had developed a personal vendetta against her and that she was acting to preserve the integrity of the judicial system. As such, her conduct in writing letters to Mr. Roberts and Mr. Johnson and, thus, instigating the investigation into Mr. Barrett's activities was engaged in under color of law.

Subsequently, the defendant spoke with the media concerning her perception of Mr. Barrett's actions. *See* Docket Entry No. 22, exhibits G and H. Common sense dictates that the newsworthiness of this item for the television and print media largely involved the defendant's status as a general sessions judge. It is not likely

that the media would be interested in reporting on every potential stalking or harassment case which occurs in this area. Accordingly, the Court finds that the defendant's communication with the media occurred in large part because of her position as a public official, and thus, occurred under color of law.

B. Absolute Immunity

The Supreme Court held in *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), that Congress did not intend to abolish the doctrine of absolute judicial immunity when enacting section 1983. *Id.* at 554, 87 S.Ct. at 1218, 18 L.Ed.2d at 295. Therefore, the doctrine applies to prevent parties form suing judges for civil rights violations when acting in their judicial capacity. *See Kurz v. Michigan*, 548 F.2d 172, 174 (6th Cir.), *cert. denied*, 434 U.S. 972, 98 S.Ct. 526, 54 L.Ed.2d 462 (1977) (granting absolute immunity to a judge for actions that took place during the discharge of his official duties). A judge will not be stripped of her immunity "because the action [she] took was in error, was done maliciously, or was in excess of [her] authority; rather, [she] will be subject to liability only when [she] has acted in the 'clear absence of all jurisdiction.' " *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 1101, 55 L.Ed.2d 331, 339 (1978) (quoting *Bradley v. Fisher*, 80 U.S. 335, 20 L.Ed. 646, 13 Wall 335 (1871)).

Whether an act is devoid of jurisdiction is determined by the nature of the act rather than the person to whom the act is attributed. *Forrester v. White*, 484 U.S. 219, 227, 108 S.Ct. 538, 544, 98 L.Ed.2d 555, 565 (1988). In

Forrester, the Supreme Court determined that discharging a court employee fell outside the scope of judicial or adjudicative actions. *Id.* at 229, 108 S.Ct. at 545, 98 L.Ed.2d at 566. Thus, the nature of the act decloaked the judge of absolute immunity. *Id.*

The defendant asserts that she wrote letters to General Johnson and Mr. Roberts detailing her concerns about the plaintiff's activity out of fear for the safety of herself and her family and her concern that the plaintiff could be "obstructing justice." Docket Entry No. 20 at 16. She further contends that her actions displayed a "consistent and uncontroverted pattern of judicial conduct which is directly related to the preservation of the integrity of the Environmental Court and Defendant's ability to properly preside over that court." *Id.* at 17. While it may be true that the defendant believed that she was attempting to preserve the integrity of the court, the acts represented administrative or executive functions as opposed to adjudicative ones. *See Forrester*, 484 U.S. at 229, 108 S.Ct. at 545, 98 L.Ed.2d at 566 (finding that the doctrine of judicial immunity applies when a judge is performing judicial, rather than legislative, executive, or administrative acts). As none of the alleged violations in the present case involve the actions of the defendant concerning proceedings in the courtroom or decisions concerning the plaintiff's case, the Court finds that the doctrine of absolute immunity does not apply to bar the plaintiff's claims against the defendant. *Id.*

C. Qualified Immunity

The doctrine of qualified immunity shields public officials from money damages for conduct in performing discretionary functions if that conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). Indeed, qualified immunity constitutes "an *immunity from suit rather* than a mere defense to liability." *Mitchell v. Forsythe*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411, 425 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.").

> The ultimate burden of proof is on the plaintiff to show that the defendants are not entitled to qualified immunity. Defendants bear the initial burden of coming forward with facts to suggest that they were acting within the scope of their discretionary authority during the incident in question. Thereafter, the burden shifts to the plaintiff to establish that the defendants' conduct violated a right so clearly established that any official in defendants' positions would have clearly understood that they were under an affirmative duty to refrain from such conduct.

Washington v. Newsom, 977 F.2d 991, 995 (6th Cir. 1992), *cert. denied*, 507 U.S. 1031, 113 S.Ct. 1848, 123 L.Ed.2d 472 (1993). However, "summary judgment would not be appropriate if there is a factual dispute (i.e., a genuine issue of material fact) involving an issue on which the

question of immunity turns, such that it cannot be determined before trial whether the defendant did acts that violated clearly established rights." *Poe v. Haydon*, 853 F.2d 418, 426 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 788, 102 L.Ed.2d 780 (1989)).

There are a number of ways a public official can establish the defense of qualified immunity. First, qualified immunity will be sustained if the parameters of the federal right at issue were not sufficiently clear at the time the defendant acted. *See Procunier v. Navarette*, 434 U.S. 555, 564, 98 S.Ct. 855, 861, 55 L.Ed.2d 24, 32 (1978). Second, if the interest asserted by the plaintiff was clearly protected by federal law, but it was not clear whether an exception permitted the defendant's acts, the defendant is entitled to immunity. *Mitchell*, 472 U.S. at 535 n.12, 105 S.Ct. at 2820 n.12, 86 L.Ed.2d at 431 n.12. Third, the defendant is entitled to immunity if she can show that "it was objectively reasonable for [her] to believe that [her] acts did not violate those rights," even if the parameters of the plaintiff's rights were clearly established. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271, 278 (1986). Before the Court considers any of these concepts, however, it must determine whether the plaintiff has alleged a violation of a federal right at all. *See Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277, 287 (1991).

Mr. Barrett's allegations of violations of his federal rights include retaliation for the exercise of his right to free speech under the First Amendment to the Constitution and deprivation of his liberty and property interests in violation of his right to substantive and procedural due

process. The Court will consider each of these alleged constitutionally protected rights in turn.

1. First Amendment

Mr. Barrett alleges that the defendant, acting under the color of state law, deprived him of his rights under the First Amendment by accusing him of stalking her. Docket Entry No. 15 at 12-13. Specifically, Mr. Barrett asserts that the defendant's retaliatory conduct includes instigating an investigation by the Metropolitan Police Department and knowingly making false accusations against him to the media. *Id.* The plaintiff avers that the defendant engaged in these acts in retaliation for his investigation into her affairs and his criticism of her character and fitness as a public official. *Id.*

Retaliatory conduct for an individual's exercise of his right to free speech under the First Amendment is one form of a claim under 42 U.S.C. § 1983. *See Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977). Unlike section 1983 claims for violation of due process, however, the plaintiff need not have incurred an injury that amounts to a constitutional violation. *McBride v. Village of Michiana,* 1994 WL 396143 (6th Cir.). Even conduct which would otherwise be permissible is unconstitutional if retaliation for the plaintiff's exercise of protected speech is the impetus for the defendant's acts. *Id.* at 4 (citing *Buise v. Hudkins,* 584 F.2d 223, 229 (7th Cir. 1978), *cert. denied,* 440 U.S. 916, 99 S.Ct. 1234, 54 L.Ed.2d 466 (1979)).

The United States Court of Appeals for the Sixth Circuit stated in *McBride* that "the act of retaliation [need

only] consist of the deprivation of a non-trivial commodity" to be unconstitutional. *Id.* Furthermore, the Court noted that government action need not actually prohibit protected speech or conduct, but need only result "in a chilling effect upon an individual's right of free speech" in order to potentially violate the First Amendment. *Id.* (citing *Laird v. Tatum*, 408 U.S. 1, 11, 92 S.Ct. 2318, 2324, 33 L.Ed.2d 154, 162 (1972)).

In order to establish that the defendant falsely accused Mr. Barrett of stalking her in order to punish him for exercising his First Amendment rights, he must establish the following elements: (1) that he engaged in constitutionally protected conduct and (2) that his conduct was a "substantial factor" or "motivating factor" in the defendant's conduct. If he has met this burden, the plaintiff can succeed on his claim if the defendant fails to prove that she would have acted as she did even if the plaintiff's conduct had not taken place. *Ratliff v. Wellington Exempted Village Sch. Bd. of Educ.*, 820 F.2d 792 (6th Cir. 1987). After determining the protected status of the plaintiff's conduct, the Court must consider the essential element of the intent of the defendant. This analysis presents something of a problem considering the factual nature of the issue of intent and the objective of using qualified immunity as a dispositive tool in early stages of litigation to preclude the government from unnecessary expenditure in defending its agents. *See Rakovich v. Wade*, 850 F.2d 1180, 1210 (7th Cir.), *cert. denied*, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 534 (1988). While the intent of the defendant is rarely an appropriate consideration during the summary judgment stage, it is necessary for the Court to address it in order to determine the issue of qualified immunity.

One well-established principle is that the non-movant's supported allegations must be taken as true at the summary judgment stage. *Davidson & Jones Dev. Co.*, 921 F.2d at 1349. Accordingly, if the plaintiff provides sufficient factual support, the Court must assume that the defendant's motivation for her conduct was improper. *See Rakovich*, 850 F.2d at 1210 (citing *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738, 73 L.Ed.2d at 410).

Mr. Barrett has not attempted to hide the fact that he has been working to keep the defendant from being re-elected. Indeed, he has stated publicly that she is "unfit to hold a public office" and that he is on a quest to ensure that she does not regain that office after her present term is over. This type of criticism and mud-slinging, while not particularly elegant, represents just the type of political speech protected under the First Amendment. *Bridges v. California*, 314 U.S. 252, 270, 62 S.Ct. 190, 197, 86 L.Ed. 192, 207 (1941) ("[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."). As such, the Court finds that he has established the first element of retaliation under the First Amendment.

As noted previously, the Court must assume that the defendant engaged in conduct with improper motives if the plaintiff has sufficiently supported such allegations. Mr. Barrett asserts that the defendant made her allegations after Mr. Barrett had begun investigating her affairs because his investigation angered her. The defendant does not disagree about the timing of the events, but insists that she contacted law enforcement officials because she was concerned about the plaintiff's behavior with respect to her safety and the integrity of the judicial

process. Defendant's response to plaintiff's statement of undisputed material fact (filed March 7, 1996; Docket Entry No. 42) at ¶ 19. Nonetheless, it is clear that the defendant acted in response to the plaintiff's conduct and that she was angry about it.

According to the deposition testimony of general Sessions Judge William Higgins,[5] the defendant stated, with regard to the plaintiff, that she had retained a lawyer and that [the plaintiff] was "in trouble." Deposition of William Higgins (filed February 14, 1996; Docket Entry No. 30) at 17. Judge Higgins stated that the defendant was staring "daggers" at him and was "shouting" during a judges' meeting in which she brought up the conflict with the plaintiff. *Id.* at 18, 39. He described her as "very emotional, very angry, red-faced" and "just sort of venomous." *Id.* at 40. Additionally, Judge Higgins stated that when he encountered the defendant a few weeks after the meeting, she shouted "[y]our friend Frank Barrett is a fruitcake" and made a comment about Mr. Barrett stalking her. *Id.* at 20.

The defendant concedes that she reviewed the state stalking statute and determined that it did not apply to the plaintiff's conduct and she "never found a statute which satisfied [her] that [she] had probable cause to seek a warrant against him." Docket Entry No. 42 at ¶ 35, 38. However, it cannot be disputed that the defendant instigated an investigation into the plaintiff's activities and

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[5] Judge Higgine testified at his deposition that he and Mr. Barrett are social acquaintances. Docket Entry No. 30 at 4. Judge Higgins is not related in any way to the judge to whom the instant case is assigned.

informed members of the local media that she believed the plaintiff was stalking her. *See* Docket Entry No. 22, exhibits G and H. As the plaintiff's supported allegations must be treated as true, the Court finds that the plaintiff has provided sufficient evidence at this stage to support his claim of retaliation.

Once the plaintiff has established a constitutional violation, his attempt to pierce the armor of qualified immunity will fail if it was unclear at the time the defendant engaged in the acts whether existing authority permitted the acts at issue. At the time the defendant engaged in the activities at issue, *Mt. Healthy* and it [sic] progeny had been decided for quite some time. In *McBride*, the Sixth Circuit cited a long line of cases from the Supreme Court and the United States Court of Appeals for the Seventh Circuit emphasizing that public officials may not act in retaliation for an individual's exercise of free speech. *McBride*, 1994 WL 396143 at 3-4. Therefore, at the time the defendant acted, the law was clearly established that the plaintiff had a right to free speech without fear of retribution based on the exercise of that First Amendment right. As Mr. Barrett has supported his claims of retaliation at this stage, and the principle that a public official may be liable for acting in retaliation for an individual's exercise of his free speech rights under the First Amendment, the Court finds that the defendant is not entitled to qualified immunity on the plaintiff's claims of retaliation.

2. Procedural Due Process

The Fourteenth Amendment provides, in pertinent part, that no "State [shall] deprive any person of life, liberty, or property, without the due process of law. . . . " United States Constitution amend. XIV, § 1. "[A] person's reputation, good name, honor, and integrity are among the liberty interests protected by the due process clause of the fourteenth amendment." *Chilingirian v. Boris*, 882 F.2d 200, 205 (6th Cir. 1989). However, it is well established that injury to reputation, standing alone, is not sufficient to invoke the Due Process Clause. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Mertik v. Blalock*, 983 F.2d 1353, 1361 (6th Cir. 1993). While 42 U.S.C. § 1983 provides redress for deprivations of constitutionally protected interests, it does not represent the cure-all remedy for every allegedly tortious act of a public official. *See Paul*, 424 U.S. at 702, 96 S.Ct. at 1161, 47 L.Ed.2d at 414. As such, the scope of protected liberty interests has been rather narrowly construed by the Supreme Court. *Mertik*, 983 F.2d at 1362.

The parameters of what constitutes deprivation of a liberty interest remain ambiguous. *See Neu v. Corcoran*, 869 F.2d 662, 667 (2nd Cir.), *cert. denied*, 493 U.S. 816, 110 S.Ct. 66, 107 L.Ed.2d 33 (1989). While the Supreme Court, in *Paul*, clearly stated that defamation resulting in stigma alone is not sufficient to state a cause of action for deprivation of a liberty interest, the lines are not as clear at [sic] to what additional negative consequences the plaintiff must experience to successfully establish a constitutionally protected interest. *See id.* at 701, 96 S.Ct. at 1160, 47 L.Ed.2d at 414. *Paul* established a basic guiding principle that in order to invoke procedural due process, a

plaintiff must allege loss of a "more tangible interest" than just reputation. *Id.* According to the Court, the defamation must be accompanied by "the loss, infringement or denial of a government right or benefit previously enjoyed by [the plaintiff]." *Mertik*, 983 F.2d at 1362 (citing *Paul*, 424 at 712, 96 S.Ct. at 1165-66, 47 L.Ed.2d at 420).

One manner of establishing the existence of a protected liberty interest is by showing the deprivation of a right bestowed upon an individual by state law, in conjunction with the publication of defamatory statements. *Paul*, 424 U.S. at 710-11, 96 S.Ct. at 1165, 47 L.Ed.2d at 419. Alteration of an individual's rights, which he possesses by virtue of state statutory or common law may implicate both property and liberty interests, necessitating the procedural guarantees of the Fourteenth Amendment. *Id.* at 711, 96 S.Ct. at 1165, 47 L.Ed.2d at 420. Examples of "legal guarantees" bestowed by the state which a public official cannot withdraw without due process of law include the issuance of a driver's license and the status of a parolee. *Id.* at 711, 96 S.Ct. at 1165, 47 L.Ed.2d at 419-20.

Mr. Barrett contends that the defendant's allegedly false accusations have blackened his reputation, and thus, hampered his "ability to engage in the common occupations of life." Docket Entry No. 15 at ¶ 47. He asserts that his business has suffered significantly as a result of the accusations. *Id.* at ¶¶ 34-36. In support of this contention, the plaintiff states that the loss in business is manifested by the reduction in profits and his unrealized financial expectations. Even overlooking the ambiguous nature of this assertion of his financial injuries caused by the defendant's accusations, a slump in business does not rise to

the level of the "tangible interest" contemplated by the Supreme Court in *Paul*.

It is well established that precluding an individual from obtaining his livelihood implicates his protected property interests. However, as the Sixth Circuit has noted, "not all cases in which a plaintiff's 'means of livelihood' are negatively affected will implicate protected property interests." *Mertik v. Blalock*, 983 F.2d 1353, 1361 (6th Cir. 1993). In *Mertik*, the defendants had interfered with the plaintiff's *ability* to perform her job by interfering with her contractual right to teach her students. *Id.* There is no evidence that the defendant has interfered with Mr. Barrett's contracts between himself and his customers. Indeed, there is no evidence that the defendant has had any contact with the plaintiff's business, business associates, customers or referred to the plaintiff's professional ability or reputation in any manner.

Additionally, the plaintiff asserts that, under Tennessee law, one's business and goodwill constitute property rights. Docket Entry No. 33 at 9 n.6 (citing *Flatt v. Barbers' Union*, 304 S.W.2d 329, 331 (Tenn.), *cert. denied*, 355 U.S. 904, 78 S.Ct. 329, 2 L.Ed.2d 259 (1957) and *Young v. Cooper*, 203 S.W.2d 376, 384 (1947)). As such, the plaintiff contends that the state bestows property rights upon an individual for his interest in his business and professional reputation, necessitating due process upon interference with those rights.

While procedural due process is required upon the withdrawal of a "legal guarantee" bestowed on the individual by the state, it is not at all clear to the Court that

the defendant's conduct has resulted in the withdrawal of such a right. The plaintiff has provided the Court with no support for his contention that the defendant has interfered with his business or attempted to "destroy his custom, credit or profits." *Flatt*, 304 S.W.2d at 331. For the Court to extend "interference with [an individual's] business" to apply to this situation involving a rather public personal conflict, in which the opposing party has made no reference to the plaintiff's business, would extend this state-bestowed right beyond its scope. Indeed, in *Flatt*, the very case cited by the plaintiff, the Supreme Court of Tennessee noted that while the defendant union had directly impaired the plaintiff's business to an unlawful degree, peaceful picketing did not represent forbidden conduct. *Id.* Certainly, picketing outside a business constitutes a rather public form of criticism of the business and, possibly, the business owner's practices. Similarly, the Court does not consider the defendant's conduct sufficiently invasive of the plaintiff's "goodwill" to constitute a deprivation of his property rights implicating the due process requirements of the Fourteenth Amendment.

3. Substantive Due Process

Mr. Barrett also asserts that the defendant's conduct has deprived him of his substantive due process rights under the Fourteenth Amendment. Docket Entry No. 15 at ¶ 47. He contends that she "maliciously, corruptly and under color of law" has violated his "ability to engage in the common occupations of life." *Id.* Conduct is unconstitutional when an official's acts are "unreasonable, arbitrary and cause a deprivation of a substantive right specified in the Constitution." *Parate v. Isibor*, 868 F.2d

821, 831 (6th Cir. 1989). It is well established that rights implicating substantive due process include the rights to "choose and pursue a career, 'to engage in the common occupations of life.' " *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983) (quotinq *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042, 1045 (1923)).

As noted previously, the only indication that Mr. Barrett's business has been negatively affected is his allegation of loss of customers and, consequently, lower profits than he had expected. Affidavit of Frank Barrett (filed February 14, 1996; Docket Entry No. 26) at ¶ 17. Even considering this evidence in the light most favorable to the plaintiff, the Court fails to find that this alleged drop in profits rises to the level of an unconstitutional deprivation of his right to engage in his profession. As such, the Court finds that the plaintiff has failed to establish a protected liberty interest in order to overcome the defendant's qualified immunity defense.

IV.

Plaintiff's Motion for Partial Summary Judgment

The Court need only address the plaintiff's motion for partial summary judgment on ne claims for retaliation under 42 U.S.C. § 1983 and defamation under Tennessee common law.

The Court was required previously to consider the intent element in its qualified immunity analysis, pursuant to the defendant's motion for summary judgment on that issue. Looking at the evidence in the light most favorable to the plaintiff, the Court is convinced that the plaintiff supported his allegations of the defendant's

improper intent. Clearly then, upon *his* motion for partial summary judgment, the Court must consider the defendant's supported allegations as true.

The defendant asserts that she informed the police, General Johnson and Mr. Roberts of her concerns for her safety and the safety of her family based on Mr. Barrett's erratic, allegedly volatile and violent behavior. Docket Entry No. 29 at 108. This assertion is supported by the deposition testimony of Joan Nixon[6] that Mr. Barrett was engaging in violent behavior manifested by angry outbursts and the use of various expletives and the defendant's assertions that she has seen Mr. Barrett at the Courthouse numerous times and observed him "peering" in her courtroom. *Id.* at 234-35. Correspondence with General Johnson and Mr. Roberts supports the defendant's assertion that another reason for contacting them was her suspicion that Mr. Barrett was attempting to obstruct justice by forcing her to recuse herself from further cases involving him. *See* Docket Entry No. 22, exhibit E.

As noted previously, the plaintiff must establish that his constitutionally protected conduct was a substantial or motivating factor in the defendant's conduct in order to succeed on the retaliation claim. Such a determination is largely based on the fact finder's belief or lack of belief in the defendant's stated motivations. Even the plaintiff noted in his memorandum (Docket Entry No. 37) that such issues are rarely appropriate for disposition upon a

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[6] Affidavit of Joan Nixon (filed February 14, 1996; Docket Entry No. 23).

motion for summary judgment. *Id.* at 2. Viewing the evidence in the light most favorable to the defendant, the Court concludes there exists a genuine issue of material fact concerning the defendant's motivation for her conduct which precludes summary judgment on the plaintiff's claim of retaliation.

Finally, the plaintiff as moved for summary judgment on his claim of defamation under Tennessee common law. The plaintiff is correct in his memorandum in support (Docket Entry No. 27), recognizing that he must prove injury from the allegedly defaming statements in order to succeed on his defamation claim. *Id.* at 16; *see Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978). As with his claim for deprivation of liberty and/or property interests, the Court is not convinced that there is no genuine issue of material fact as to the existence of the plaintiff's alleged injury. Additionally, even the plaintiff notes that whether the statements had a defamatory impact is generally a question for the jury. *See Memphis Publishing Co.*, 569 S.W.2d at 412. As such, this claim cannot be disposed of on summary judgment.

V.

Conclusion

The Court concludes that as to the plaintiff's due process claims, the plaintiff has not established violations of constitutionally protected rights so as to meet his burden of overcoming the defendant's defense of qualified immunity. Mr. Barrett has failed to establish injury in addition to the alleged stigma he has suffered to invoke due process under the Fourteenth Amendment. However,

he has sufficiently supported his allegations of retaliation for exercise of his First Amendment rights in order for that claim to survive the defendant's motion for judgment as a matter of law based on the defense of qualified immunity. Accordingly, the Court will not grant the defendant's motion for summary judgment on the basis of qualified immunity as to the plaintiff's claim of retaliation under the First Amendment.[7]

Furthermore, the Court concludes that there exist genuine issues of material fact as to the First Amendment retaliation claim and the claim of defamation under Tennessee common law. The plaintiff's remaining claims have been rendered moot based on the Court's findings of qualified immunity. As such, the plaintiff's motion for partial summary judgment shall be denied.

An appropriate order shall be entered.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States
District Judge
7-30-96/

---

[7] The defendant did not move for summary judgment with regard to the plaintiff's claim of defamation. Considering the findings as to the section 1983 retaliation claim, the Court will continue to exercise supplemental jurisdiction over this state tort claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FRANK BARRETT, Plaintiff,	)	JURY DEMAND
vs.	)	Civil No. 3:95-0914
NANCY I. HARRINGTON a/k/a PENNY HARRINGTON. Defendant.	)	Judge Higgins

---

AFFIDAVIT

State of Tennessee)
County of Davidson)

FRANK BARRETT, being duly sworn according to law, makes oath as follows:

1) I am a resident and citizen of Williamson County in the Middle District of Tennessee, and I am the plaintiff in the matter of *Frank Barrett v. Nancy Ilene Harrington a/k/a Penny Harrington*, Civil No. 3:95-0214 in the United States District Court for the Middle District of Tennessee.

2) I own and operate The Barrett Company, a sole proprietorship contracting business whereby I am engaged in the removal and replacement of prepared roof coverings on existing residential structures, one of the common occupations of life. My business is also known under the trade names A-Barrett Company and Bardale Company.

3) I have previously been civilly sued by the Metropolitan Government of Nashville and Davidson County for failing to obtain building permits which the codes Department contends are required and which I contend are not required for particular jobs performed by my company. These matters were heard before Judge Penny Harrington during September 1994 on the environmental docket of the General Sessions Court for Davidson County.

4) During the course of my appearance in court before Judge Harrington, I observed that she displayed an unusually arrogant and irascible temperament and failed to show appropriate respect for litigants appearing before her. This led me to conclude that Judge Harrington is not a fit person to hold public office, and I decided to advocate the political viewpoint that Ms. Harrington should not be elected to office in the future.

5) In order to effectively advocate this political position, I sought to gather information about Judge Harrington from a variety of sources of information available to the general public, including the Davidson County Election Commission, the Tennessee Department of Safety, the Court Administrator for the Metropolitan General Sessions Court, and the Metropolitan Traffic Violations Bureau.

6) During the course of my search of public records, I discovered information suggesting that Judge Harrington had dismissed parking citations issued against her and/or her husband. This information suggested to me that Judge Harrington had engaged in criminal conduct, and I received legal advice from one or more of my

attorneys indicating that my impression in that regard is correct.

7) I obtained copies of the subject parking citations from the clerk of the Traffic Violations Bureau. On February 13, 1995 I went to this office, which is located at 100 James Robertson Parkway in Nashville, and I obtained certified copies of several of these citations.

8) On February 14, 1995 I received a telephone call from Anna-Maria Williams, who identified herself as a detective with the Metropolitan Police Department Murder Squad. Detective Williams questioned me about my activities in regard to gathering information about Judge Harrington. She advised that she was investigating an allegation that I was "stalking" Judge Harrington. I understand "stalking" to be a criminal offense in Tennessee and that this offense is regarded with some considerable seriousness.

9) No charge was ever brought against me as a result of this investigation, and I learned form a subsequent telephone conversation with Detective Williams that the investigation had been closed.

10) I would emphatically state that I have not at any time "stalked" Judge Harrington, nor have I ever engaged in criminal conduct of any kind directed at her.

11) As a result of being questioned by police in regard to this accusation I felt humiliated, and I experienced significant mental anguish and emotional distress. I felt anxiety and fear of being arrested and/or charged with a crime which I feared would subject me to public

embarrassment and humiliation and would harm my personal and business reputation and impair my ability to make a living.

12) During August or September 1995 I gave truthful information regarding Judge Harrington's dismissal of her own parking tickets to a reporter for the *Nashville Banner* newspaper, which I know to be a daily newspaper of general circulation in Nashville and Middle Tennessee. This resulted in widespread, unflattering media attention being focused on Judge Harrington.

13) I have read a newspaper article appearing in the September 19, 1995 edition of the *Nashville Banner* wherein Judge Harrington falsely accused me of stalking her.

14) On the evening of September 12, 1995 I was contacted by telephone by Jay Korff, a reporter for WKRN Channel 2 News in Nashville. Mr. Korff informed me that Judge Harrington had accused me of stalking her and asked for my reaction. On that evening at 10:00 p.m. I viewed a Channel 2 News broadcast wherein Judge Harrington falsely accused me of stalking her. I recall that she characterized me as a dangerous man and a threat to her physical safety. These allegations are completely untrue.

15) I understand that WKRN Channel 2 is a commercial television station affiliated with the ABC network, which broadcasts across Middle Tennessee and beyond.

16) As a result of reading the *Nashville Banner* article and viewing the Channel 2 news broadcast, I felt personal humiliation and mental anguish. Being falsely accused of

criminal conduct subjected me to significant public embarrassment and humiliation. I believe that my personal reputation and standing in the community have suffered as a result of such false accusations.

17) For several weeks or months following publication of these media reports, my business experienced a significant decline in profitability. I am unable to calculate with mathematical certainty how much of this loss is directly attributable to Judge Harrington's false charges, but in my experience as a businessman I do not know of any other obvious factor to which this decline can be fairly attributed. Based on this I believe that the goodwill of my business has been damaged by Judge Harrington's false charges and I have been harmed in my business reputation.

FURTHER THE AFFIANT SAITH NOT.

/s/ Frank Barrett
FRANK BARRETT

Sworn to and subscribed before me this 14th day of February, 1996.

/s/ Lisa A. Thomas
NOTARY PUBLIC

My Commission expires: 11-28-98

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FRANK BARRETT, Plaintiff, vs. NANCY I. HARRINGTON, a/k/a PENNY HARRINGTON, Defendant.	)	NO. 3:95-0214

EXCERPTS FROM DEPOSITION TESTIMONY OF NANCY ILENE HARRINGTON

DATE: JANUARY 15, 1996

TIME: 10:15 A.M.

LOCATION: 2016 EIGHTH AVENUE SOUTH
NASHVILLE, TENNESSEE

BEVERLY "BECKY" COLE
REGISTERED PROFESSIONAL REPORTER
P. O. BOX 3025
HENDERSONVILLE, TENNESSEE
37077-3025
(615) 230-8934

* * *

[p. 87] A. Right.

Q. Do you reca11 what day of the week it was?

A. I do not. It was my domestic violence week when I was – my sensitivity was certainly heightened, too.

Q. Was this an entire week of domestic violence dockets?

A. Yes.

Q. That are ordinarily held on Thursdays but sometimes you will schedule an entire week?

A. Oh, no. For the last three years Judge Robinson and I have heard all the domestic violence cases. We arrange with the Clerk's Office to have them sorted out so that we could specialize and, so, we hear them all.

There is a special team of prosecutors that handles all the domestic violence cases. And we have probation officers who specialize in it, and we hear all the violations of orders of protection and all the stalking cases and things of that nature. It's a tough docket.

Q. So you mentioned stalking cases, you're quite familiar with the elements of what [p. 88] does or does not constitute stalking?

A. Right. I was involved in the drafting of the law.

Q. And you regularly conducted trials of stalking charges?

A. They don't – they're not often trials, sometimes they are preliminary hearings. There's an occasional trial. But I am certainly familiar with the elements.

Q. So you have conducted probable cause determinations in stalking cases as well?

A. Right.

Q. As a result of your conversation with Judge Faimon, other than running the record check did you do anything else?

A. I wrote to Ricky Rooker, I think that was the same day. And –

Q. Mr. Rooker, the Circuit Court Clerk?

A. Right.

Q. Go ahead.

A. And told him – because, among other things, Opie and Bill said that Mr. Barrett got sued a lot and was very litigious and sued people a lot, and that there would probably be some information that could be gathered about him

* * *

[p. 96] that you can take in that building. I'm not sure whether the electronic machines had been set up in the lobby at that time or not.

I think I called my brother and talked to him about what to do. And I believe it was on that date or maybe the next date that I wrote letters to Torry Johnson and to John Roberts requesting an investigation and security, and what court personnel, we have told them that I was concerned.

Somewhere about the same time I wrote these letters and after talking to my brother is when I decided that the best way to handle it was through an attorney, because I did look at the stalking law, and I did look at what Mr. Barrett was doing, and I did not feel that it was covered

by the stalking law, as it's changed but I'm sure you have last year's law.

Q. Right. Right. So –

A. As I said, I was instrumental in the creation of it.

Q. Okay. The definition of stalking changed effective July 1st, 1995, did it not?

A. That's what my law books say.

Q. Yes.

[p. 97] A. So what we have reference to is that law which existed prior to that date.

Q. Okay. Is this a correct recitation of the law that was in force prior to July 1st, '95?

A. Is that the '95 edition?

Q. This is the current one.

A. Right.

Q. Okay. And let me make this the next numbered exhibit, please. And that's a copy of the current stalking law?

A. It is.

Q. I would like to make that the next numbered exhibit. Okay. With regard to the law in force during early 1995, do I understand correctly that you did parse that statute to see whether Mr. Barrett's conduct fit?

A. Right.

Q. And you determined that it did not?

A. I did.

Q. How did you make that determination? What elements of that offense at that time did you think were not present?

A. Because there had been no specific verbal or written threat or vandalism then known [p. 98] to me, or unconsented – to physical contact, the acts just simply did not – the facts simply did not fit under the stalking.

The emotional distress was clearly there. And I thought that the actions were those which would cause a reasonable person to suffer substantial emotional distress, which I was definitely feeling. And I thought he had the requisite intent.

But the law is so specific with regard to the definitions of follows and harass, I didn't know if he was following me or not. That's one of the reasons that I wanted to get some records about him, so that – so that I could know maybe what kind of vehicle he drove or when he might be around.

It was a scary situation to feel like I was being harassed, and yet there was no statute to prohibit it.

Q. Did you believe that Mr. Barrett had the intent to place you in fear of a sexual offense?

A. I didn't know what Mr. Barrett's intent was.

Q. Were you aware of any facts or

* * *

[p. 172] activities seeking information about you caused you to fear for your safety?

MR. HOWARD: I'm going to object to that because she's already answered that question. She said she's still apprehensive. But I am not telling you not to answer it. Go ahead.

A. I just don't know.

BY MR. HERBISON:

Q. Was there a time that you concluded that any kind of criminal prosecution of Mr. Barrett was just not going to happen?

A. I – not going to happen?

Q. Was not going to take place?

A. That's – your using a passive form of the verb is difficult in Davidson County when everybody – in order to initiate prosecution, the alleged victim has to go before the Magistrate.

Q. Is there a time when you determined that you would not do that?

A. Yeah. I – when I talked to Todd, I told him I didn't think that this made out the elements of stalking, but I didn't know whether there was a statute – I hadn't found one – and I [p. 173] guess I – I guess I thought that he had halted his activities short of criminal acts by the time I talked to Anna Marie Williams the last time.

Q. And would that have been during the winter or at the latest the spring of 1995?

A. I once more will tell you I do not know the date.

Q. And your being a General Sessions Judge, you're familiar with the process by which criminal warrants are issued in this county?

A. Yes.

Q. Did you ever appear before any judge or magistrate and ask for issuance of a warrant charging Mr. Barrett with any crime?

A. No.

Q. Judge, why did you not do that?

A. Because I never found a statute which satisfied me that I had probable cause to seek a warrant against him.

Q. Other than those persons you've previously testified about and other than your present attorneys, can you tell us who else you have ever had a conversation with concerning Frank Barrett?

MR. HOWARD: Do you want to

* * *

[LOGO]

METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY

NANCY I. HARRINGTON
JUDGE
DIVISION IV

METROPOLITAN GENERAL
SESSIONS COURT
301 Metropolitan Courthouse
NASHVILLE, TENNESSEE
37201
(615) 862-8311
FAX (615) 862-8361

February 9, 1995

General Victor S. Johnson, III
Office of District Attorney General
222 2nd Avenue North
Washington Square, Suite 500
Nashville, TN 37201

Dear General Johnson:

I wish to request a formal investigation by your office of Frank Barrett of Nolensville, Tennessee. It is my belief that Mr. Barrett who is a roofing contractor and who has been a defendant before me in a suit by Metropolitan Government charging him with failure to obtain permits before working on a roof, is attempting to obstruct justice by harassing me and my family. The purpose of the harassment is to create circumstances that would appear to require me to recuse myself from cases enforcing the Metropolitan Codes against him.

On information and belief, Mr. Barrett or his agents, have trespassed at my home and have followed me and my husband. Not only do I believe there is obstruction of

justice, I am also fearful of Mr. Barrett, based upon his erratic and threatening behavior in the various offices he has visited.

I would be pleased to meet an agent of the District Attorney General's office or TBI [sic] to detail more clearly Mr. Barrett's activities.

Thank you for giving this complaint your immediate and serious attention.

Sincerely,

/s/ Penny Harrington
Penny Harrington

PH/skc

[LOGO]

METROPOLITAN GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY

NANCY I. HARRINGTON
JUDGE
DIVISION IV

METROPOLITAN GENERAL
SESSIONS COURT
301 Metropolitan Courthouse
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February 9, 1995

John Roberts
U.S. Attorney
110 9th Avenue South, Suite A-961
Federal Court House
Nashville, TN 37203-3870

Dear Mr. Roberts,

I wish to request a formal investigation by your office of Frank Barrett of Nolensville, Tennessee. It is my belief that Mr. Barrett who is a roofing contractor and who has been a defendant before me in a suit by Metropolitan Government charging him with failure to obtain permits before working on a roof, is attempting to obstruct justice by harassing me and my family. The purpose of the harassment is to create circumstances that would appear to require me to recuse myself from cases enforcing the Metropolitan Codes against him.

On information and belief, Mr. Barrett or his agents, have trespassed at my home and have followed me and my husband. Not only do I believe there is obstruction of

justice, I am also fearful of Mr. Barrett, based upon his erratic and threatening behavior in the various offices he has visited.

I would be pleased to meet an agent of the U.S. Attorney or FBI to detail more clearly Mr. Barrett's activities.

Thank you for giving this complaint your immediate and serious attention.

Sincerely,

/s/ Penny Harrington
Penny Harrington

PH/skc

No. 97-1362

Supreme Court, U.S.
F I L E D
MAR 19 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

FRANK BARRETT,

Petitioner,

vs.

NANCY I. HARRINGTON a/k/a Penny Harrington,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Lutz Appellate Services, inc.

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a judge's instigation of a criminal investigation against a disgruntled litigant, taken to protect the integrity of the judicial system, is a "judicial act" and therefore entitled to absolute judicial immunity.

TABLE OF CONTENTS

	Page
Counterstatement of Question Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Counterstatement of Constitutional and Statutory Provisions Involved	1
Introduction	2
Statement of the Case	3
Reasons for Denying the Writ	6
I. The Decision By The Court Of Appeals Does Not Conflict With Relevant Decisions Of This Court Related To Absolute Judicial Immunity From Suit Brought Pursuant To 42 U.S.C. § 1983.	6
A. The Court of Appeals correctly construed and applied the "two-prong" test established and followed by this Court in *Stump v. Sparkman* and its progeny in the determination that the acts in question were "judicial acts."	6
B. Barrett's statement of the case ignores certain uncontroverted material facts upon which the Court of Appeals relied and further misstates the basis for the decision by the Court of Appeals.	11

Contents

	Page
II. The Decision Of The Court Of Appeals Does Not Conflict With The Decisions Of Other United States Court Of Appeals Or Any Previous Decision Of The Sixth Circuit Court Of Appeals.	14
III. Barrett's Presentation Of The Holding In *Kalina v. Fletcher* Is Clearly Incorrect And Misplaced.	17
Conclusion	19

TABLE OF CITATIONS

Cases Cited:

Adams v. McIlhany, 764 F.2d 294 (5th Cir. 1985)	14
Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 113 S. Ct. 2167, 124 L. Ed. 2d 391 (1993)	7
Briscoe v. LaHue, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983)	7
Buckley v. Fitzsimmons, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993)	7
Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)	7, 13, 17
Harper v. Merckle, 638 F.2d 848 (5th Cir. 1981)	14
Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979)	15

Contents

Page

Kalina v. Fletcher, 522 U.S. __, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) 2, 3, 17, 18, 19

King v. Love, 766 F.2d 962 (6th Cir. 1985) 16

Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993) .. 16

Martinez v. Winner, 771 F.2d 424 (10th Cir. 1985) ... 16

Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991) 7, 8, 12, 14, 16, 19

Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984) 16

Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978) 2, 6, 7, 8, 9, 14

Statutes Cited:

28 U.S.C. § 1291 6

42 U.S.C. § 1983 ..... 1, 5, 6, 7

Tennessee Code Annotated § 27-5-108 (1980) 1

United States Constitution Cited:

First Amendment 1, 5

Fourteenth Amendment 5

Contents

Page

APPENDIX

Appendix A — Affidavit Of Joan A. Nixon Dated February 12, 1996 ..... 1a

Appendix B — Excerpts From Deposition Of Nancy Ilene Harrington Dated January 15, 1996 ..... 4a

OPINIONS BELOW

For the Court's convenience, in this opposition brief, citations to the opinion of the United States Court of Appeals for the Sixth Circuit (reported at 130 F.3d 246 (6th Cir. 1997)), and the order and memorandum opinion of the United States District Court for the Middle District of Tennessee, Nashville Division (unreported, filed July 31, 1996), will be to the page numbers of these documents attached to the Petition as App. pp. 1-44 and App. pp. 45-71, respectively. Citation to these opinions will occur as "Pet. App." followed by the appropriate page number(s).[1]

COUNTERSTATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner cites the First Amendment to the United States Constitution, 42 U.S.C. § 1983, and Tennessee Code Annotated § 27-5-108 (1980) as the constitutional and statutory provisions involved in the matter before this Court. Respondent respectfully disputes the applicability or relevance of Tennessee Code Annotated § 27-5-108 to the determination of the instant petition as the reasoning, basis for, and the holding of that portion of the opinion at issue neither considers nor depends upon this state statute.

---

1. Citations to other documents attached to the Petition will occur as "Pet. App." followed by the appropriate page number(s). Citations to the Petition will occur as "Pet." followed by the appropriate page number(s). Citations to relevant documents attached to this brief in opposition will occur as "App." followed by the appropriate page number(s). Citations to the record will occur as "R." followed by the docket number, the description given to the document, and appropriate page number(s).

INTRODUCTION

The petitioner, Frank Barrett, petitions this Court to issue writ of certiorari and grant plenary review of the decision by the Court of Appeals granting absolute immunity to the respondent, Judge Penny Harrington, related to her contacting state and federal prosecutors on her judicial letterhead to prompt an investigation into obstruction of justice charges. Petitioner alleges that this portion of the opinion of the Court of Appeals represents an extension of the doctrine of absolute judicial immunity that is unwarranted by the decisions of this Court and those of several United States Courts of Appeal. In the alternative, petitioner requests this Court to issue writ of certiorari, vacate the opinion of the Court of Appeals, and remand to the Court of Appeals for further consideration in light of *Kalina v. Fletcher*, 522 U.S. __, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997).

As detailed below, the Petition presents no issues that warrant either this Court's plenary review of the decision by the Court of Appeals or the necessity to vacate and remand to the Court of Appeals for further consideration. First, contrary to petitioner's assertion, the decision by the Court of Appeals does not conflict with relevant decisions by this Court because it correctly construes and applies the "two-prong" test established and followed by this Court in *Stump v. Sparkman*, 435 U.S. 349, 362, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978), and its progeny, in the determination that the acts in question were "judicial acts" entitling respondent to absolute judicial immunity. Related to that analysis, petitioner's statement of the case is misleading in its selective omission of certain uncontroverted and material facts upon which the Court of Appeals relied in its decision. In addition, petitioner misstates the analysis and reasoning of the Court of Appeals. Second, contrary to petitioner's assertion, the decision by the Court of Appeals does not conflict with

decisions of other United States court of appeals or with previous decisions of the Sixth Circuit Court of Appeals. Third, because petitioner's presentation of the holding in *Kalina v. Fletcher*, *supra*, is clearly incorrect and misleading, his reliance on this case is misplaced.

STATEMENT OF THE CASE

At all times material to the matter before this Court, defendant/respondent Nancy I. ("Penny") Harrington (hereinafter "Judge Harrington") has been an elected Metropolitan General Sessions Judge of Nashville and Davidson County, primarily responsible for the environmental docket. Plaintiff/petitioner Frank Barrett (hereinafter "Barrett") has been and is the owner of a roofing business that has been involved in an ongoing controversy with the Department of Codes and Davidson County regarding work permits for various projects. (Pet. App. at 2-3).

In September 1994, Barrett appeared before Judge Harrington in Environmental Court regarding two violations of the Environmental Codes. At the conclusion of a bench trial, Judge Harrington rendered judgments against Barrett. Barrett alleges that at the hearing Judge Harrington did not show appropriate respect for litigants appearing before her. He further alleges that, based upon his observations, he determined that Judge Harrington was not "fit . . . to hold public office," and he thus decided to "investigate" her in order to advocate opposition to her re-election. (Pet. App. at 3).

As part of his "investigation," Barrett visited various state and local government offices in an alleged effort to gather public information regarding Judge Harrington. On February 1, 1995, Barrett visited the Davidson County Election Commission Offices to request certain documents about Judge Harrington.

While requesting these documents from Joan Nixon, an executive secretary to the Election Commission, Barrett displayed such vehement behavior, including profanity to the extreme, that Ms. Nixon believed that Barrett posed a physical threat not only to herself and other female employees present, but also to Judge Harrington. Although Ms. Nixon did not have a personal relationship with Judge Harrington, she called Judge Harrington to notify her of Barrett's behavior. (Pet. App. at 3-4; App. at 1a-3a). At about this same time, Larry Brinton, a local television news reporter, told Judge Harrington that Barrett was very hostile towards her and suggested that she should be concerned for her safety because of Barrett's behavior and demeanor. (Pet. App. at 4).

Based primarily on these reports of Barrett's behavior, Judge Harrington believed Barrett to be a disgruntled litigant who sought to harass not only herself, but her family as well. On February 9, 1995, using her judicial letterhead, Judge Harrington wrote letters to State District Attorney General Victor S. Johnson, III and United States Attorney John Roberts, requesting that they investigate Barrett because he was "attempting to obstruct justice by harassing [her] and [her] family," including requiring her to recuse herself from future cases against him, which were likely to arise due to Barrett's ongoing dispute with the Codes Department. (Pet. App. at 4, 84-87).

Shortly after the time Judge Harrington forwarded the letters of February 9, 1995, and apparently in response to these letters, Detective Anna Marie Williams was assigned to investigate the circumstances through interviews of Judge Harrington and Frank Barrett. In the course of her interview with Barrett, Detective Williams advised Barrett that he was being investigated for stalking Judge Harrington. (Pet. App. at 5-6). Barrett admits that he "has no way of knowing whether [Judge Harrington]

was, as she claims, in fact scared." (R.15 Second Amended Complaint at p. 10, ¶ 29(d)).

Despite her continuing apprehension regarding the reported public behavior of Frank Barrett, once Judge Harrington determined that no statute fully applied to that behavior, she expressly told police not to pursue the matter and to close the file. (App. at 5a-6a). Further, it is uncontroverted that Judge Harrington has never caused a warrant or formal charge to be taken out against Barrett. (R.22 Appendix, Collective Exhibit C at pp. 172-73; Pet. App. at 83). Nonetheless, Judge Harrington has been forced to recuse herself from hearing a subsequent proceeding in the Environmental Court involving Barrett. (Pet. App. at 33).

In a complaint filed September 21, 1995,[2] Barrett brought suit against Judge Harrington pursuant to 42 U.S.C. § 1983 alleging violations of his First and Fourteenth Amendment rights. Barrett further alleged seven pendent state claims, including a claim for common-law defamation.[3] On February 14, 1996, Judge Harrington filed a motion to dismiss and a motion for summary judgment claiming, in part, that she was entitled to either absolute or qualified immunity. On this same date, Barrett moved for partial summary judgment on the merits of his claim. On July 30, 1996, the District Court determined Judge Harrington's motion to dismiss was moot. The court granted Judge Harrington's motion for summary judgment in part, finding she was entitled to qualified immunity on Barrett's claim of due process violations. However, the court denied Judge Harrington's motion related to Barrett's First Amendment

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2. Barrett was twice granted permission to amend his complaint.

3. With the exception of the common-law defamation claim, all pendent claims have been voluntarily dismissed. (Pet. App. at 47).

claim. The court further denied Barrett's motion for partial summary judgment in its entirety. (Pet. App. at 1-2, 45).

Pursuant to 28 U.S.C. § 1291, Judge Harrington appealed the denial of summary judgment related to the First Amendment claims. In its opinion filed November 20, 1997, the United States Court of Appeals for the Sixth Circuit reversed in part and affirmed in part the District Court's denial of summary judgment. The Court of Appeals held that, in view of the undisputed material facts as determined by the court, Judge Harrington's letters to state and federal prosecutors were "judicial acts" and that she was entitled to absolute immunity for such acts. The court held that Judge Harrington's communications with members of the news media were not "judicial acts" and that she was not entitled to absolute or qualified immunity for such acts. (Pet. App. at 1-44).

REASONS FOR DENYING THE WRIT

I.

THE DECISION BY THE COURT OF APPEALS DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT RELATED TO ABSOLUTE JUDICIAL IMMUNITY FROM SUIT BROUGHT PURSUANT TO 42 U.S.C. § 1983.

A. The Court of Appeals correctly construed and applied the "two-prong" test established and followed by this Court in *Stump v. Sparkman* and its progeny in the determination that the acts in question were "judicial acts."

This Court has consistently held that judges are generally absolutely immune from civil suits for money damages, including those suits brought pursuant to 42 U.S.C. § 1983.

E.g., *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991) (citations omitted). This Court has specifically held that state judges are absolutely immune from liability under § 1983. *Briscoe v. LaHue*, 460 U.S. 325, 334, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). Such far-reaching protection is justified "by a long-settled understanding that the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435, 113 S. Ct. 2167, 124 L. Ed. 2d 391 (1993).

This Court has consistently held that absolute judicial immunity is overcome in only two situations. First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Mireles*, 502 U.S. at 11-12 (citations omitted).

This Court has not expressly limited absolute judicial immunity to paradigmatic adjudicative acts formally confined within the walls of a courtroom. *See, e.g., Forrester v. White*, 484 U.S. 219, 227-28, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988). Rather, this Court has consistently held that whether an action is judicial depends upon a two-prong analysis that focuses on the "nature" and "function" of the act, not the "act itself." *Mireles*, 502 U.S. at 13 (quoting *Stump v. Sparkman*, 435 U.S. at 362). This Court has further emphasized that this analysis examines "the nature of the function performed, not the identity of the actor who performed it." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) (citing *Forrester*, 484 U.S. at 229). First, looking to the nature of the act at issue, courts must determine "whether it is a function normally performed by a judge." *Stump*, 435 U.S. at 362. Under this prong, even if a particular act is not a function normally

performed by a judge, courts are directed to "look to the particular act's relation to a general function normally performed by a judge." *Mireles*, 502 U.S. at 13. Second, regarding the expectations of the parties, courts "must assess whether the parties dealt with the judge in his or her judicial capacity." *Stump*, 435 U.S. at 362.

This Court has further held that once absolute judicial immunity is established for the conduct at issue, that immunity "is not overcome by allegations of bad faith or malice." *Mireles*, 502 U.S. at 11.

In the matter before this Court, the Court of Appeals correctly construed and applied the two-prong analysis in determining that Judge Harrington's letters to state and federal prosecuting attorneys were "judicial acts" entitling her to absolute immunity. Regarding the first prong of the *Stump* analysis, the Court of Appeals found that "the general function of Judge Harrington's conduct in writing to the prosecuting authorities was to protect the integrity of the judicial decision-making process." (Pet. App. 30). In so doing, the Court of Appeals properly recognized that under this first prong, its determination was justified because of "the nexus between the Judge's action which gave rise to the threat and her response to the threat, not simply the response itself." (Pet. App. at 31). Accordingly, the Court of Appeals found:

> Clearly, there was a direct relational nexus between Harrington's judicial decisions, Barrett's response in "investigating" and threatening her, and Harrington's response in contacting the prosecuting attorneys. Based upon what Ms. Nixon and Mr. Brinton told her that Barrett had said about her, and their expressions of concern for her safety arising out of his conduct, Judge Harrington understandably felt

> threatened by Barrett's statements, and the letters she wrote to the prosecutors were clearly designed to address and deter such conduct, and directly related to her role in adjudicating the case which engendered Barrett's conduct in the first place.[4] Just as a judge's citation for contempt against a party who obstructs justice is a judicial act taken to preserve integrity of the judicial system, so too is the instigation of criminal proceedings against a disgruntled litigant whose conduct may amount to obstruction.

(Pet. App. at 30-31). The Court of Appeals further found,

> [T]he letters did involve the "case deciding process," as the Judge wrote to express her fear that the harassment would cause her to have to recuse herself from future cases involving Mr. Barrett — recusal is undoubtedly an act that concerns judicial decision-making.

(Pet. App. at 27).

Regarding the second prong of the *Stump* analysis, the Court of Appeals found that "Barrett clearly dealt with Judge Harrington in her judicial capacity." (Pet. App. at 32). In so doing, the Court of Appeals properly recognized that under this second prong, its determination was justified because:

> Barrett's entire course of conduct was focused on Harrington's judicial role. First, he dealt with

4. As recognized by the Court of Appeals, the District Court likewise found that Judge Harrington's communications, *i.e.*, the letters at issue, were "prompted by her fear that in her role as a judge, she had aggravated a litigant such that he had developed a personal vendetta against her and that she was acting to preserve the integrity of the judicial system." (Pet. App. at 30, 54).

> Harrington in her judicial capacity when she presided over Barrett's case involving two codes violations, and it was at that time that Barrett formulated his opinion that Judge Harrington was unfit to hold office, and began his "investigation" campaign. Second, all of his activities , from his "investigation" campaign, to his comments to others about her, to the disclosure to the media of her ticket dismissals, were in response to her judicial decisions and conduct.

(Pet. App. at 32). Recognizing (1) Barrett's ongoing feud with the Department of Codes that guaranteed he would be involved in future proceedings in the Environmental Court over which Judge Harrington generally presided (Pet. App. at 2-3); (2) Judge Harrington's specific complaint in the letters at issue regarding obstruction of justice in relation to her role as a judge (Pet. App. at 30, 84-87); and (3) the fact that Judge Harrington ultimately felt compelled to recuse herself in a subsequent proceeding involving Barrett (Pet. App. at 33), the Court of Appeals reasoned:

> Even more to the point, the litigant, empowered to subject the judge to liability for reporting the [litigant's] conduct, can affect the judge's ability to sit on cases involving that litigant, thereby effectively creating a situation wherein the litigant will not have to answer to that judge or even appear before the judge. This enables the litigant to "forum shop" by effecting the recusal of a judge through the litigant's own threatening or harassing conduct.

(Pet. App. 33).

B. Barrett's statement of the case ignores certain uncontroverted material facts upon which the Court of Appeals relied and further misstates the basis for the decision by the Court of Appeals.

In his statement of the case, Barrett makes no mention of the fact that, as found by the Court of Appeals, he has been involved in an ongoing dispute with the Department of Codes Administration of the Metropolitan Government of Nashville and Davidson County, the result of this controversy being his appearing in the Environmental Court. In addition, Barrett has omitted the fact that Judge Harrington has subsequently been forced to recuse herself from a proceeding in the Environmental Court involving Barrett and resulting from that ongoing controversy, a fact noted as relevant to its decision by the Court of Appeals. (Pet. App. at 27, 33). Further, although found by the Court of Appeals to be an uncontroverted material fact and relevant to its decision, Barrett makes no reference to the messages of concern and warning by Joan Nixon and Larry Brinton to Judge Harrington in either his statement of the case or argument. (Pet. App. at 3-4, 29-33; App. at 1a-3a).

Related to his presentation of the facts, Barrett either misstates, or misunderstands, the basis for the decision by the Court of Appeals. He states,

> The Court of Appeals seems to have credited the Respondent's claim that the Petitioner *in fact* engaged in intimidating conduct which constituted or could have constituted an obstruction of justice: . . .

(Pet. at 10 (emphasis added)). He further asserts,

> If the Court of Appeals had credited Mr. Barrett's proffered evidence that he engaged in no unlawful

> conduct toward Judge Harrington, the Respondent's response cannot have been deemed reasonable.

(Pet. at 11). What Barrett does not acknowledge is that the Court of Appeals does not rest its decision on whether, in fact, Mr. Barrett engaged in intimidating conduct or unlawful conduct.[5] In addition, the Court of Appeals neither rests its decision solely on whether Judge Harrington understandably or reasonably felt threatened by Barrett's behavior. Rather, the Court of Appeals properly rests its decision upon the determination of whether (1) there existed a "direct relational nexus between Harrington's judicial decisions, Barrett's response in 'investigating' and threatening her, and Harrington's response in contacting the prosecuting attorneys," (Pet. App. at 30); and (2) "Barrett clearly dealt with Judge Harrington in her judicial capacities." (Pet. App. at 32).

Also related to his presentation of the facts, Barrett's resulting argument is flawed in several ways. First, in concluding that Judge Harrington's conduct was that of a complaining witness and not that of a judge (Pet. at 9), Barrett improperly focuses on the act itself and the identity of the actor, rather than, as did the Court of Appeals, "look[ing] to the particular act's relation to a general function normally performed by a judge." *Mireles*, 502 U.S. at 13. Second, Barrett persists in alleging that Judge Harrington's motives for writing the letters were taken out of bad faith because she allegedly knew the stalking statute did not apply to Barrett's conduct. (Pet. at 15). However, as succinctly stated by the Court of Appeals:

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5. It should be noted that the allegation by Mr. Barrett that he has not engaged in unlawful conduct has no relevance to whether, as found by the Court of Appeals, any conduct by Mr. Barrett could be perceived by others, such as Joan Nixon or Larry Brinton, as being intimidating or threatening. Moreover, Barrett admits that he "has no way of knowing whether [Judge Harrington] was, as she claims, in fact scared." (R.15 Second Amended Complaint at p. 10, ¶ 29(d)).

> This allegation does not undermine the application of the immunity for several reasons: first, although Harrington alluded to the stalking law in her letters, she specifically complained of obstruction of justice in relation to her role as a judge; second, because of the functional analysis we do not focus on the particulars of the act; third, the Supreme Court has clearly ruled that immunity "is not overcome by allegations of bad faith or malice. . . ." *Mireles*, 502 U.S. at 11.

(Pet. App. 31 n.20). Third, Barrett appears to conclude that because Judge Harrington would, pursuant to state statute, necessarily not be involved in the appeal of the original September 1994 Environmental Court proceedings at issue, any conduct by Judge Harrington after that hearing is automatically not a "judicial action." (Pet. at 4 n.1). This logic is consistent with his ignoring the material relevance of his ongoing feud with the Codes Department and the potential need for Judge Harrington to recuse herself from future Environmental Court proceedings involving Barrett. However, as recognized by the Court of Appeals and consistent with decisions by this Court,

> the applicability of judicial immunity is not limited to acts which occur within the confines of the courtroom, and consequently, acts performed outside of the courtroom are not, ipso facto, non-judicial acts.

(Pet. App. at 32). *See, e.g., Forrester*, 484 U.S. at 227-28.

II.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURT OF APPEALS OR ANY PREVIOUS DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS.

Barrett appears to contend that the decision of the Court of Appeals is in conflict with existing decisions of other United States court of appeals and previous decisions of the Sixth Circuit Court of Appeals (Pet. at 12-15). Stressing that a "relevant criterion" in these cases is the question of a "judge's motivation," Barrett concludes that the cases cited indicate that his allegation that Judge Harrington was motivated by bad faith precludes a finding of a judicial act. However, as previously stated and found by the Court of Appeals, this Court has clearly ruled that immunity "is not overcome by allegations of bad faith or malice. . . ." *Mireles*, 502 U.S. at 11. In addition, each case cited by Barrett has either been disapproved, is distinguishable, or has been misstated in the Petition.

Barrett's reliance on *Harper v. Merckle*, 638 F.2d 848, 859 (5th Cir. 1981) is misplaced because the case is clearly distinguishable. Unlike the instant matter, the *Harper* court found that the second prong of the *Stump* analysis was not met, *i.e.*, the expectations of the parties. Moreover, the United States Court of Appeals for the Fifth Circuit has subsequently disapproved the comments in *Harper* related to the motivations of a judge and upon which Barrett relies. In *Adams v. McIlhany*, the Fifth Circuit Court of Appeals noted, in part,

> [*Harper*] restricted its holding denying immunity to the "exceedingly narrow and . . . rarest of factual settings." (citation omitted). Accordingly, that case,

> by its own terms, is virtually without precedential value. In addition, *we note that Harper's reliance on the "motives" of the judge is inconsistent with McAlester, Bradley, Stump, and Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 l. Ed. 2d 396 (1982).*

764 F.2d 294, 298 (5th Cir. 1985) (emphasis added).

Barrett's reliance on *Harris v. Harvey*, 605 F.2d 330 (7th Cir. 1979), is likewise misplaced. This case is clearly distinguishable in that, unlike the matter before this Court, none of the alleged conduct by the judge in *Harris* related to that judge's efforts to preserve the integrity of the "case deciding process," or the issue of recusal. (Pet. App. 27). The Court of Appeals in the matter before this Court did rely upon *Harris* in its determination that "when Judge Harrington communicated to the media regarding Mr. Barrett, she stepped out of her judicial role, and is not entitled to absolute judicial immunity for those acts." (Pet. App. 36). However, the Court of Appeals rightly distinguished these types of communications, as well as similar circumstances in *Harris,* from the circumstance involving the "filing [of] a complaint with law enforcement concerning a disgruntled litigant who is harassing a judge." (Pet. App. at 36). The Court of Appeals states,

> The distinction here is a clear one. When a judge makes a complaint to law enforcement concerning a litigant's conduct which is adversely affecting or obstructing the judicial process, that judge is requesting some official action in connection with the judicial process.

(Pet. App. at 36).

Barrett's reliance on *Malina v. Gonzales*, 994 F.2d 1121 (5th Cir. 1993), is equally misplaced. Again, unlike the circumstances in the instant matter, *Malina* is not concerned with circumstances related to that judge's efforts to preserve the integrity of the "case deciding process," or the issue of recusal. (Pet. App. 27). In addition, contrary to Barrett's "motivation" argument, the *Malina* court expressly follows this Court in stating that within the context of the two-prong "functional" analysis, "It is important to note that 'judicial immunity is not overcome by allegations of bad faith or malice.' It is the Judge's actions alone, not intent, that we must consider." *Malina*, 994 F.2d at 1125.

Further, Barrett's reliance on *King v. Love*, 766 F.2d 962 (6th Cir. 1985), and *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984), is also misplaced. Similar to his improper focus in the instant matter on the identity of the actor and the act itself instead of "look[ing] to the particular act's relation to a general function normally performed by a judge," *Mireles*, 502 U.S. at 13, Barrett incorrectly focuses on the fact that in these two cases the judges initiated arrests or accusatory processes. (Pet. at 13-14). Again, however, unlike the instant matter, these cases are not concerned with circumstances related to those judges' efforts to preserve the integrity of the "case deciding process," or the issue of recusal. (Pet. App. 27).

Finally, Barrett's alleged distinction in *Martinez v. Winner*, 771 F.2d 424 (10th Cir. 1985), does not actually serve as a relevant distinction, but rather betrays Barrett's attempt to confine "judicial acts" to those acts that occur "during the course of a [single] trial." (Pet. at 14-15). This necessarily flawed attempt is consistent with Barrett's ignoring the material relevance of his ongoing feud with the Codes Department and the potential need for Judge Harrington to recuse herself from future Environmental Court proceedings involving Barrett. However,

as recognized by the Court of Appeals and consistent with decisions by this Court,

> the applicability of judicial immunity is not limited to acts which occur within the confines of the courtroom, and consequently, acts performed outside of the courtroom are not, ipso facto, non-judicial acts.

(Pet. App. at 32). *See, e.g., Forrester*, 484 U.S. at 227-28.

III.

BARRETT'S PRESENTATION OF THE HOLDING IN *KALINA v. FLETCHER* IS CLEARLY INCORRECT AND MISPLACED.

As part of his overall theme of the importance of alleged false statements related to the initiation of arrests or complaints to law enforcement officials, Barrett relies on *Kalina v. Fletcher*, 522 U.S. __, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997), for the proposition that "this Court has held that a prosecuting attorney is not entitled to absolute immunity *for making false statements of fact* in an affidavit supporting an application for an arrest warrant." (Pet. at 9 (emphasis added)). Barrett appears to thus conclude that the reason immunity was not granted in this case is because the prosecuting attorney made false statements. However, this is simply not the holding of the case.

In *Kalina*, this Court was faced with determining whether a prosecuting attorney was entitled to absolute immunity in connection with the preparation and filing of (1) an unsworn information charging burglary; (2) an unsworn motion for an arrest warrant; and (3) a "Certification for Determination of Probable Cause" in which she summarized the evidence

supporting the charge and swore to the truth of the alleged facts under penalty of perjury. 139 L. Ed. 2d at 475-76. Consistent with this Court's analysis of absolute judicial immunity, the *Kalina* court recognized that the determination of prosecutorial immunity requires the examination of "the nature of the function performed." *Id.* at 480. Consequently, this Court held that the preparation and filing of the information and the motion for an arrest warrant served the function of an advocate. *Id.* In addition, this Court found that the prosecuting attorney's drafting of the certification itself also served the function of an advocate. *Id.* at 481-82. This Court reasoned that such activities involved the exercise of the advocate's professional judgment and that, up to this point, the prosecuting attorney would be entitled to immunity. *Id.* However, this Court held that the act of personally attesting to the truth of the averments in the certification did not involve the exercise of that professional judgment because "that judgment could not affect the truth or falsity of the factual statements themselves." *Id.* As a result, and contrary to Barrett's assertion, this Court did not withhold immunity because the statements turned out to be false, but rather because, under the specific facts of the case, the "function" served by the swearing under penalty of perjury was the "function" of a witness, regardless of whether it was done by an attorney or layperson. By way of further distinction, in the instant matter before this Court, it is uncontroverted that Judge Harrington has never caused a warrant or formal charge to be taken out against Barrett. (R.22 Appendix, Collective Exhibit C at pp. 172-73; Pet. App. at 83).

Accordingly, just as Barrett has mistakenly focused on the particularities and peculiarities of the conduct of Judge Harrington in the instant matter without properly "look[ing] to the particular act's relation to a general function normally performed by a judge," so, too, has he focused only on the particularities and peculiarities of the conduct of the prosecuting

attorney in *Kalina* rather than on the relation of the conduct to the general function normally performed by a prosecutor. *See Mireles*, 502 U.S. at 13.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — AFFIDAVIT OF JOAN A. NIXON DATED FEBRUARY 12, 1996

STATE OF TENNESSEE)
) SS:
COUNTY OF DAVIDSON)

AFFIDAVIT

The Affiant, Joan A. Nixon, upon affirmation, makes the following Affidavit from her own personal knowledge and belief.

1. I am executive secretary to the Davidson County Election Commission.

2. I have held this position for about ten years.

3. On February 1, 1995, Frank Barrett appeared in the Election Commission offices and made request for certain documents regarding Judge Penny Harrington.

4. While Mr. Barrett was in our offices and in the course of making these requests, Mr. Barrett used profanity to the extreme.

5. Most of his profanity was directed at Judge Harrington.

6. Mr. Barrett expressed personal hatred for Judge Harrington.

7. Among other things, he screamed that Judge Harrington was a "conniving bitch" and that she was making his life miserable.

Appendix A

8. Mr. Barrett continued to pace around the office, staring very angrily at me and others and scaring all of us.

9. I believed that he was so angry that he might physically attack me.

10. His language and behavior made me most uncomfortable and frightened, not only for myself but for others around me and for Judge Harrington.

11. I did provide the documents that Mr. Barrett requested.

12. Mr. Barrett's behavior caused me to remember having read in the newspaper that, at some time in the past, Judge Harrington had been the victim of a stalker.

13. Because of Mr. Barrett's behavior and my own fears, I called Judge Harrington two times on February 1, 1995 to report his erratic behavior and my concern for her safety.

14. I told Judge Harrington that Mr. Barrett was acting very angrily and that I was physically frightened for myself and for Judge Harrington.

15. I also told my superior, Michael McDonald, about Mr. Barrett and he told me that the next time Mr. Barrett came in, I should refer Mr. Barrett to Mr. McDonald.

16. On February 2, 1995, because of a phone call made by Mr. Barrett to our office in which he again displayed extremely belligerent behavior, I again called Judge Harrington to express my personal fear for the safety of myself, other ladies in this office and for Judge Harrington.

Appendix A

17. Although I have worked professionally with Judge Harrington, I have no personal relationship with her.

18. FURTHER AFFIANT SAITH NAUGHT.

/s/ Joan A. Nixon
JOAN A. NIXON

APPENDIX B — EXCERPTS FROM DEPOSITION OF NANCY ILENE HARRINGTON DATED JANUARY 15, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3:95-0214

FRANK BARRETT,

Plaintiff,

vs.

NANCY I. HARRINGTON, a/k/a
PENNY HARRINGTON,

Defendant.

EXCERPTS FROM DEPOSITION OF NANCY ILENE HARRINGTON

DATE: JANUARY 15, 1996

TIME: 10:15 A.M.

LOCATION: 2016 EIGHTH AVENUE SOUTH
NASHVILLE, TENNESSEE

* * *

[p. 236] nearest police station if I ever saw Mr. Barrett around me, the natural — the natural feeling would be that it's physical.

Q. So you do recall Judge Faimon saying get to a police officer if he comes around?

A. Right. It was either Judge Faimon or Opie. I'm not really sure. They were talking kind of at the same time, and it was one or the other of them.

Q. Did you mention Opie to Jay Korff?

A. I don't know.

Q. Did you tell Mr. Korff that Mr. Barrett had stopped lurking after police had told him to leave you alone?

A. I don't remember what I told Mr. Korff.

Q. Do you recall using words to that effect?

A. I may have because I felt that he had.

Q. Has anyone with the Police Department ever told you that they told Mr. Barrett to leave you alone?

A. Anna Marie Williams told me that she told him just to stay away from me, and he said he was going to continue looking at the public records, that was his right.

And she said, well, you can do that, just stay away from her, you're scaring her. And after that he did.

Appendix B

After that she came to me, and said how do you want to dispose of this file. And as I have told you before, I told her to close it.

Q. Did you tell Mr. Korff that Mr. Barrett had leaked a story about you with regard to the Broadway Dinner Train?

A. I think he asked me if I knew where that story might have come from, because someone anonymously came to the station and told them that.

And the only person I know who had been trying to find out things about me was Mr. Barrett.

Q. So did you believe Mr. Barrett to have been the source of that story?

A. He was the only person that I know who might have done that.

Q. Had Channel 2 at that time run a story involving you and the Broadway Dinner Train?

A. I don't think so.

* * *